91-2012

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JACKIE HOLDER, individually and in his official capacity as County Commissioner for Bleckley County, Georgia and ROBERT JOHNSON, individually and in his official capacity as Superintendent of Elections for Bleckley County, Georgia,

Petitioners,

v.

REV. E. K. HALL, SR., DAVID WALKER, U.S. DONALDSON, RICHARD HARRIS, WILLIE ATES, REV. WILSON C. ROBERSON, and NAACP Chapter of Cochran/Bleckley County,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Whether the Voting Rights Act of 1965 empowers the courts to alter local government to ensure proportional minority representation?

2. Whether the legal analysis utilized by the Eleventh Circuit is contrary to the principles and mandates established by the Court in *Thornburg v. Gingles,* 478 U.S. 30 (1986)?

3. Whether the Eleventh Circuit erred by applying the "totality of circumstances" test to determine the three threshold requirements mandated by *Gingles* had been proven?

4. Whether Respondents established the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate, as required by *Gingles*?

5. Whether Respondents established the minority group in Bleckley County is politically cohesive as required by *Gingles*?

6. Whether Respondents established the minority group in Bleckley County is sufficiently large and geographically compact to constitute a majority in a single-member district as required by *Gingles*?

7. Whether the district court was "clearly erroneous" in its findings of fact?

8. If the district court did misapply any legal standard, whether the case should be remanded in lieu of final determination by the Eleventh Circuit Court of Appeals?

II. LIST OF ALL PARTIES BELOW

The caption contains the names of all current parties to the proceeding. Respondents initially challenged the manner of electing the Bleckley County Board of Education and the Cochran City Council, but those claims were settled prior to trial, leaving only the claim against Petitioners that was tried in the district court.

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V. OPINIONS BELOW

On March 25, 1992 the Eleventh Circuit reversed the district court's judgment in favor of Petitioners, and on May 27, 1992 denied Petitioners' Suggestion of Rehearing En Banc. The Eleventh Circuit's opinion is reported at *Hall v. Holder,* 955 F.2d 1563 (11th Cir. 1992) and the district court's opinion is reported at *Hall v. Holder,* 757 F. Supp. 1560 (M.D. Ga. 1991).

VI. JURISDICTION

i. Date of entry of opinion below

The Opinion of the Eleventh Circuit Court of Appeals was entered on March 25, 1992, and this Petition for a Writ of Certiorari has been brought within 90 days of said Opinion as required by Supreme Court Rule 13.1.

ii. Petitioner's Suggestion of Rehearing En Banc

Petitioners filed a Suggestion of Rehearing En Banc on April 14, 1992, which was denied May 27, 1992.

iii. Not under Rule 12.3 (No cross-petition)

This is not a Cross-Petition, and Petitioners hereby assert that they know of no party who intends to file such a petition, thus the provisions of Supreme Court Rule 12.3 do not presently apply.

iv. Statutory provision allowing review

Review is sought pursuant to 28 U.S.C. § 1254(1) (1988) since Petitioners are asking the Court to review the

decision of the Eleventh Circuit Court of Appeals entered March 25, 1992.

VII. PRIMARY CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

i. U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ii. U.S. Const. amend. XV, § 1

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

iii. 42 U.S.C. § 1973 (1988) (*See* Appendix)

VIII. STATEMENT OF THE CASE AND FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

i. Course of Proceedings and Jurisdiction Below

Respondents filed this lawsuit on July 17, 1985 contending the single county commissioner form of

government in Bleckley County, Georgia, violates Section 2 of the Voting Rights Act of 1965 and rights secured by the Constitution of the United States. Respondents invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343(3), 1343(4) and 2201 (1988) (the suit being authorized by 42 U.S.C. §§ 1973 and 1983 (1988)). Petitioners filed an answer in a timely manner denying Respondents were entitled to the relief sought in their complaint.

The trial court, the Honorable Wilbur D. Owens, Jr., Chief Judge, presiding, entered its order and judgment in favor of Petitioners on March 7, 1991. On March 25, 1992, the judgment of the district court was reversed by the Eleventh Circuit and the case was remanded for the imposition of a remedy. Petitioners filed a Suggestion of Rehearing En Banc with the Eleventh Circuit on April 14, 1992, which was denied May 27, 1992.

ii. Statement of Facts

The Eleventh Circuit decision in this case will directly impact 17 local governments in Georgia, requiring expansion of these governments to ensure proportional minority representation.

The Court has never considered a challenge to a sole commissioner form of local government. In Georgia there are presently 17 counties utilizing this form of local government. The Eleventh Circuit has determined this form of local government to be violative of the Voting Rights Act of 1965 and empowered the district court to expand the local government in Bleckley County at least five-fold to ensure proportional minority representation.

The sole commissioner form of government in Bleckley County, Georgia is a single member position elected at large from a single jurisdiction, Bleckley County. This single district has a population of 10,767, of which 22% is black.

Bleckley County has utilized the single county commissioner form of government since the county's creation in 1912. *See* Bleckley, County of, Creation, No. 355, 1912 Ga. Laws 38-41. No black person has ever run for the position of county commissioner.

In 1986, a referendum was held, in accordance with legislation enacted by the Georgia General Assembly, on the issue of whether the county should adopt a six member county commission plan. Bleckley County – Board of Commissioners; Created; Referendum, No. 292, 1985 Ga. Laws 4406-11. The legislation proposing the Board of Commissioners was rejected by Bleckley County voters, and the sole commissioner form of government was retained by a vote of 1156 to 887. Status of Referendum Elections for the Years 1953 through 1986, 1987 Ga. Laws CLXXXII, CCLXXII. There was very little organized interest or support in the black community in regard to the 1986 referendum to expand county government. 757 F. Supp. at 1564 n.4; (Appendix, 9-10 n.4); (R4-320).

The district court pointed out "[t]here was no evidence presented at trial to suggest that the specific act of creating Bleckley County's single member commission belied a racial motivation on the part of the Georgia Legislature. . . . " 757 F. Supp. at 1562; (Appendix, 5-6).

Respondents also offered no evidence to support their allegation that the 1986 referendum was conducted

to maintain the sole county commissioner form of government for racially discriminatory reasons. The Bleckley County Grand Jury recommended the referendum because there was dissatisfaction in the county about a tax increase. (R5-597).[1]

Citizens of Bleckley County prefer the sole commissioner form of government because it is less expensive than a multi-member board, the county is small, the commissioner is accessible and responsive and the commissioner acts more as an administrator than a legislator. (R5-618).

Respondents offered no evidence that the county commissioner has ever been unresponsive to the needs of minorities. Indeed, the sole commissioner is the representative of the entire county, black and white, elected at large, and responsible to all voters. It is the simplest, most pure and economical form of efficient government for a small county.

As to local elections, there is no candidate slating process in Bleckley County. (R5-514; R4-392). There have been no county commissioner races in which racial appeals to voters were made. (R5-514).

Using the 1980 black voting age population of 1,474 as a constant, the percentage of the black voting age population registered to vote was 69.74% in 1988, compared to 68.12% for whites. (Defendants' Exhibits 18 and 19).

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[1] While the district plan allowing a multi-member commission to govern Bleckley County was rejected in the 1986 referendum, only four years earlier Bleckley County voters had approved a five-member district plan for the election of the Bleckley County school board. (R3-157).

Although Respondents made much reference to alleged barriers to voting, especially prior to the Civil Rights Act of 1964 and related legislation, the testimony of Respondents' lay witnesses established there have been no barriers to blacks registering to vote or voting in Bleckley County from at least 1964 to the present. (R3-58, 94; R4-259-60; R4-267, 286; R4-315-16). Black voter registration has steadily increased during that period of time. The proportion of the black voting age population registered to vote in 1988 was essentially equal to or greater than the proportion of the white voting age population registered to vote in 1986 and 1988. These statistics further reveal blacks comprise approximately 19% of the voting age population and approximately 19% of the actual registered voters in Bleckley County. As such, any alleged past discrimination in Bleckley County or disparities in education, housing or income do not presently hinder blacks from registering and participating in Bleckley County politics.[2]

Respondents' experts *did not analyze the results of any county commissioner election* or any other state or local election to determine if there was evidence of racial bloc voting for the challenged mechanism, the sole commissioner office. Instead, opinions and statistical data were presented by Respondents only in regard to the national

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[2] Although Respondents made much reference at trial to the educational system in Bleckley County *prior to desegregation*, there is only one school system in Bleckley County, and blacks and whites share one elementary school, one middle school and one high school. (R5-492). There are no private schools in Bleckley County. (R5-501).

campaigns of Jesse Jackson in 1984 and 1988. These opinions were based on a regression analysis of the 1984 election, a so-called homogeneous precinct analysis of the 1984 election and an exit poll conducted at the time of the 1988 election. *See* 757 F. Supp. at 1565-67; (Appendix, 13-19).

Respondents' expert, Dr. Richard Engstrom, admitted the statistical evidence alone provided little evidence from which a court could conclude that racially polarized voting exists in Bleckley County. (Appendix, 40-42); (R4-440-41, 483).

The final source of the statistical evidence presented by Respondents concerned the result of an exit poll taken at the time of the 1988 presidential preference primary involving Jesse Jackson. The evidence revealed the exit poll was deficient in many respects and the results were not reliable. (R4-399).[3]

The district court determined:

> Regardless of any possible assumptions which might be drawn from the actual 1988 presidential preference primary election returns, this court is not satisfied that the results of Dr. Willingham's 1988 exit poll provide an accurate source from which the plaintiffs might buttress their position that elections in Bleckley County are characterized by white bloc voting.

757 F. Supp. at 1578; (Appendix, 45).

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[3] The district court so noted by commenting that "the results of the poll were unrepresentatively skewed. . . . [T]he poll overemphasized the electoral support received by some candidates, most importantly Reverend Jackson, and underestimated the support harnessed by other candidates." 757 F. Supp. at 1577; (Appendix, 13-19).

Respondents chose not to conduct exit polls of other elections that were conducted after this lawsuit was filed in 1985, such as the 1986 referendum on the commissioner form or the 1988 general election which contained at least one race (public service commission) that involved a black candidate. Instead, Respondents focused their attention only on the two national campaigns of Jesse Jackson which, according to Respondents' expert, Dr. Alex Willingham, placed heavy emphasis on race. (R4-394-95). His campaigns alone are not dispositive of whether a consistent pattern of racial bloc voting has existed in local elections in Bleckley County, Georgia.

While Respondents did not analyze any county commissioner elections, Petitioners did perform a regression analysis on the 1980 and 1988 votes cast for defendant Holder in the county commissioner elections, and a determination of racially polarized voting could not be made. (R5-669-72).

As to other elections, Respondents admitted black candidate Robert Benham, for instance, received the votes of both white and black voters in Bleckley County in 1984 for the Georgia Court of Appeals. (R4-387-88). Judge Benham received over half of his votes from whites. (R5-467).

In City of Cochran elections, black candidate Willie Basby won three at-large elections for city council against white opposition. 757 F. Supp. at 1568; (Appendix, 20). Basby won twice by receiving a majority of the votes cast. *Id.*

IX. REASONS FOR GRANTING THE WRIT

i. The Voting Rights Act of 1965 does not empower courts to alter local governments to ensure proportional minority representation.

The Eleventh Circuit decision, which is a published opinion and binding precedent, directly affects the local government of 19 counties in Georgia. It empowers the district court, contrary to the Voting Rights Act, to expand those governments to ensure proportional minority representation.

Section 2 of the Voting Rights Act of 1965 was amended on June 29, 1982, and states, in part:

> *Provided,* that nothing in this section establishes a right to have members of a protected class elected and numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1988).

Moreover, subsection (a) of this statute is violated *only* when there is some standard, practice or procedure that denies or abridges the right of an individual "to vote" on account of race or color. *Id.*

There has never been an intent by Congress to set aside a form of government so that minority voters will automatically be able to elect minority candidates in proportion to their population in the electorate. Instead, the inquiry is whether the minority voters have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* Whether the candidate preferred by the minority voter is also a minority is not dispositive and is irrelevant. This was made clear by the Court in *Thornburg*

v. Gingles, 478 U.S. 30 (1986), wherein the Court held, in part, as follows:

> First, both the language of § 2 and the functional understanding of the phenomenon of vote dilution mandate the conclusion that *the race of the candidate per se is irrelevant to racial bloc voting analysis*. Section 2(b) states that a violation is established if it can be shown that members of a protected minority group "have less opportunity than other members of the electorate to . . . elect representatives *of their choice*." . . . Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry. Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group, not the race of the candidate*, that is important.
>
> . . .
>
> Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis.

478 U.S. at 67-68 (emphasis added).

In addition, the Court in *Gingles* pointed out three limitations in the Senate Report which are highly relevant to the issues in this case, as follows:

> First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2; second, the conjunction of an allegedly dilutive electoral mechanism and a lack of proportional representation alone does not establish a violation; third, the results test does not assume the existence of racial bloc voting; the plaintiffs must prove it.

478 U.S. at 46.

The Senate Report accompanying the 1982 amendment to the Voting Rights Act sets forth the Senate factors to be considered in Section 2 cases. The Court in *Gingles*, however, made clear that while the Senate factors may be relevant to evaluating a minority vote dilution claim, "unless there is a *conjunction* of the following circumstances, the use of multi-member districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." 478 U.S. at 48-49 (first emphasis added).

The Court in *Gingles* established three necessary preconditions that must be proven by plaintiffs asserting a Section 2 claim. These three necessary preconditions are as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates. . . . Second, the minority group must be able to show that it is politically cohesive. If the minority group is politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests. . . . Third, the minority must be able to demonstrate the white

> majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed, . . . – usually to defeat the minority's preferred candidate.

478 U.S. at 50-51.

In light of the principles of law stated above, it is obvious that Section 2 of the Voting Rights Act of 1965 does not require proportional representation and does not give the courts the power to set aside a local government, redraw district lines or create new districts to ensure proportional representation. For example, in this case, the mere fact that a hypothetical commission of five-districts, one majority black, may be drawn does not in any way establish a Section 2 violation. As the Honorable Edith H. Jones stated in her concurring opinion in *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989),

> [Plaintiffs'] reasoning puts the cart before the horse, by authorizing a remedy for voter dilution before a violation of Section 2 has been found. Actionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model based upon whatever size is necessary to accomplish proportional representation. Adding council member districts "would create a voting rights violation where none presently exists by enabling appellants to meet the necessary preconditions of their Section 2 claim."

Id. at 543.

ii. The Eleventh Circuit's legal analysis was contrary to the Court's mandate in *Thornburg v. Gingles*.

The Eleventh Circuit admitted in its decision that there is a division within the Eleventh Circuit as to the evidentiary burdens that must be satisfied under *Gingles*. 955 F.2d at 1568 n.9. This lack of uniformity within the Eleventh Circuit as to the full contours of *Gingles* was also expressed in *Meek v. Metropolitan Dade County*, 908 F.2d 1540, 1543 (11th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1108 (1991) and in the en banc decision in *Solomon v. Liberty County*, 899 F.2d 1012 (11th Cir. 1990). The uncertainty of the Eleventh Circuit as to the contours of *Gingles* is readily apparent from its decision in the case sub judice in that the legal analysis utilized by the Eleventh Circuit is directly contrary to *Gingles*, and the evidence relied upon by the Eleventh Circuit in reaching its decision in no way establishes a Section 2 violation. As such, the decision of the Eleventh Circuit was based upon a misconception of the law and was clearly erroneous.

Prior to *Gingles*, the primary focus of the courts in Section 2 cases was the Senate factors set forth in the Senate Report accompanying the proposed 1982 amendment. Senate factors 2 and 7 state:

> 2. The extent to which voting in the elections of the state or political subdivision is racially polarized; . . . and
>
> 7. The extent to which members of a minority group have been elected to public office in the jurisdiction.

In light of *Gingles*, the courts must first determine whether the Section 2 plaintiffs have proven the three necessary preconditions to their claim before looking to the Senate factors, i.e., the "totality of the circumstances". Senate factor No. 2 became the focus of the third precondition that must be proven under *Gingles*, i.e., that "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 51. Racial bloc voting, whether it be viewed as Senate factor No. 2 or the third precondition under *Gingles*, is separate and distinct from the other Senate factors. While Senate factor No. 7 (and the other Senate factors as well) may be relevant if Respondents had produced evidence of racially polarized voting, neither Senate factor No. 7 nor the other Senate factors, i.e., the "totality", *prove* the existence of racially polarized voting. They are merely enhancement factors once the three *Gingles* factors are proven.

In *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), the Eleventh Circuit recognized the Senate factors may be relevant in evaluating a minority vote dilution claim, but that the court must first apply "a new three-part test focusing on the existence of a politically cohesive geographically insular minority group in voting along racial lines, as necessary preconditions for multi-member districts to operate to impair minority voter's ability to elect representatives of their choice." 829 F.2d at 1550. In the case at bar, in disregard of *Gingles*, the Eleventh Circuit relied upon the other Senate factors, i.e., the "totality", in determining if Respondents had satisfied the three preconditions to their claim.

In concluding that Respondents have produced sufficient evidence of racial bloc voting, the Eleventh Circuit enunciated its new legal standard of review as follows:

> Examining the issue of racial bloc voting under the totality of the circumstances existing in Bleckley County, we are forced to conclude that the district court reached a clearly erroneous decision based on its misconception of the law.

955 F.2d at 1570.

This standard of review is contrary to *Gingles* since it omits the requirement that the court independently address the issue of racial bloc voting. This is obvious when considering the court initially recognized the following while discussing the *Gingles* requirements:

> the *Gingles* decision places a "gloss" on the Senate Report factors, limiting the use of the factors by requiring that the three *Gingles* factors be established to prove a vote dilution claim.

Id. at 1568.

Based upon its misconception of the law, the court then based its determination that the *Gingles* preconditions had been established on factors in no way dispositive of the issues.

The Court in *Gingles* made clear that "the race of the candidate per se is irrelevant to racial bloc voting analysis." 478 U.S. at 67-68. The fact that the race of the candidate per se is irrelevant to a racial bloc voting analysis had been recognized by the Eleventh Circuit in *Carrollton*, wherein the court correctly interpreted *Gingles* to mean that it is the status of the candidate as the chosen representative of a particular race or group, not the race

of the candidate, that is important. 829 F.2d at 1557. This interpretation of *Gingles* was also recognized by the en banc decision of the Eleventh Circuit in *Solomon, supra,* 899 F.2d at 1021 n.12.

In this case, however, the Eleventh Circuit's *first consideration* under its "totality" review of the evidence submitted on the issue of racial bloc voting was as follows:

> Yet, blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government. . . . Lay testimony by Bleckley County's black community leaders, many of whom are seasoned local politicians, revealed a *belief* that it is next to impossible for a black candidate to win an at-large, county-wide election in Bleckley County, primarily because of the impact of the non-Cochran vote, a vote having a substantially lower percentage of blacks.

955 F.2d at 1570-71 (emphasis added).

This focus is directly contrary to the *Gingles'* mandate that "only the race of the voter, not the race of the candidate is relevant to vote dilution analysis." 478 U.S. at 68.

Even assuming the race of the candidate is relevant to a vote dilution analysis, the subjective *belief* of the witnesses proves nothing as it is speculative and conjectural. For example, in *Sonnier v. Vinton,* 484 F. Supp. 146 (W.D. La. 1980), the court rejected evidence that "blacks . . . had a defeatist attitude and did not believe that a black could ever become elected because of at-large voting," and held it "would not be sufficient to find that the

political process in Denton is not equally open to participation by blacks." *Id.* at 148-149.

The Eleventh Circuit erroneously gave undue weight to the subjective speculative "beliefs" of Respondents' witnesses and the fact that no black has run for the county commissioner position in finding Respondents had satisfied the third precondition, racial bloc voting. Respondents argue they could not produce statistically significant evidence of bloc voting in light of the limited number of black candidates. Since the race of the candidate is irrelevant, the Court allowed Respondents to sidestep their burden of proving the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.[4] Although there were numerous and various elections that could have been analyzed by Respondents, they made the decision not to analyze *any* elections involving white candidates, and presented only statistical evidence as to two campaigns of Jesse Jackson, which Respondents admitted were not sufficient to establish a consistent pattern of racial bloc voting. (R4-440-41; R6-843).[5]

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[4] Respondents' expert, Dr. Richard Engstrom, offered opinions concerning the campaigns of Jesse Jackson solely because they involved a black candidate, yet he did not offer opinions concerning other elections, such as for county commissioner, that could be analyzed even though he admitted a white candidate can be the choice of black voters. (R4-448).

[5] Considering the sole commissioner form of government is the challenged mechanism, the most relevant evidence concerns the elections for that office. Petitioners analyzed the 1980

(Continued on following page)

The Eleventh Circuit's reliance on the fact that black candidates have been elected in City of Cochran elections after city elections were restructured with a black majority district was also misplaced. As the referred-to elections were not statistically analyzed, there is no evidence whatsoever that whites and blacks voted any differently within the district whereby the black candidate was successful. In other words, it could very well be that whites and blacks voted in the exact same manner and the successful black candidates received the white crossover vote. The Eleventh Circuit *obviously assumed* whites and blacks voted differently in these elections. The same "assumption" was made in regard to the elections involving J.B. Stoner, Lester Maddox and George Wallace, which were not analyzed.[6] This is contrary to *Gingles*, which requires "plaintiff's prove their claim before they may be awarded relief." 478 U.S. at 48 n.15. This proof is available through regression analysis, which Respondents used on one election only, the 1984 Jesse Jackson campaign.

(Continued from previous page)

and 1988 elections for county commissioner, and a finding of racial polarization and vote dilution could not be made. (R5-669-672). Moreover, respondents never established who the minority-preferred candidate was in any election or that he was unsuccessful, other than Jesse Jackson.

[6] Although not analyzed, the Eleventh Circuit assumes the number of votes cast for these candidates establish "Bleckley County indeed suffers from racially polarized voting" since Stoner, Maddox and Wallace received "significant support" in elections, all of which were more than 15 years prior to the trial of this case. The court thus concludes "a substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals as late as the mid 1970's, and that they voted accordingly." 955 F.2d at 1572.

It is also interesting to note that the Eleventh Circuit indicated that black candidates have been regularly defeated in City of Cochran elections before the district system was instituted. In making this statement, the Eleventh Circuit summarily dismissed Willie Basby, a local black politician who won three at-large elections, and referred to him as an "aberration," even though the court admitted Basby was able to gather "cross-over support from Cochran's white voters." *Id.* at 1746 n.16.

In determining Bleckley County suffers from racially polarized voting, the court also makes reference to socio-economic disparities and segregation that existed in Bleckley County until the 1960s (two characterizations applicable to all communities). These factors are not indicative of whether racial bloc voting exists, and this was made clear by the Court in *Gingles*:

> Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multi-member structure interferes with their ability to elect their preferred candidates. Minority voters may be able to prove that they still suffer social and economic effects of past discrimination, that appeals to racial bias are employed in election campaigns, and that a majority vote is required to win a seat, but they have not demonstrated a substantial inability to elect caused by the use of a multi-member district.

478 U.S. at 48 n.15.

Moreover, the Supreme Court has directed that the "totality of circumstances" be considered based upon a practical evaluation of the past and present realities to

determine whether the political process is equally open to minority voters. 478 U.S. at 79.

Petitioners submit that it was the Eleventh Circuit, not the district court, that made "clearly erroneous" findings based on a misconception of the law. Respondents failed to establish the existence of racial bloc voting, the third necessary precondition under *Gingles*. Since they failed to establish racial bloc voting, the Eleventh Circuit also erred in finding Respondents established "political cohesiveness". This finding was also based on the erroneous finding that Respondents had established racial bloc voting. *See* 955 F.2d at 1573.

The Eleventh Circuit also erred, as a matter of law, in its finding that Respondents had proven the first precondition, that the black voters in Bleckley County are sufficiently numerous and geographically compact to constitute a majority in a single-member district. This finding was based on the argument that the single-member district in question can be further subdivided in a hypothetical fashion until blacks constitute a majority in one of five hypothetical districts.

This legal analysis is without basis since Bleckley County is itself a single-member district, and blacks do not constitute a majority within this district. 42 U.S.C. § 1973(b) (1988) specifically states, "nothing in this section establishes a right to have members of a protective class elected in numbers equal to their proportion in the population." Since black voters do not constitute a majority within the district in question, Respondents did not, and cannot, establish the first precondition to their claim.

In addressing the conflict in the circuit regarding proof, the Eleventh Circuit noted:

> the district court's legal interpretation of the evidence would support the district court's ultimate conclusion. . . .

955 F.2d at 1570.

Since the district court's decision was not based on misconceptions of the law and its findings were not clearly erroneous, under Rule 52 the Federal Rules of Civil Procedure the decision should have been affirmed by the Eleventh Circuit.

Although not necessary, the trial court went further than the threshold requirements and considered all of the facts and circumstances under the "totality of the circumstances." *See* 757 F. Supp. at 1582-84.

Since the district court did exactly what the Eleventh Circuit suggests should have been done, consider the totality of the circumstances, there was absolutely no basis for the Eleventh Circuit to reverse the judgment except to grant proportional representation to black voters in Bleckley County by subdividing the county further.

If the district court did use an erroneous legal standard, the Eleventh Circuit should have remanded, as it has done previously. In *Solomon, Carrollton* and *Meek*, the Eleventh Circuit reversed the judgment of each district court on the basis that the analysis of the court was premised on legal errors, but the court did not direct the district court to enter judgment in favor of the plaintiffs, as done in this case. Certainly, the district court was in a

much better position to evaluate the evidence, credibility of witnesses and so forth.[7]

A remand is consistent with *Gingles*, which recognized:

> Thus, the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

478 U.S. at 79.

iii. Specific reasons exist for granting this writ of certiorari that have importance beyond this case.

The Voting Rights Act of 1965 does not empower the courts to subdivide a jurisdiction to ensure proportional representation. This principle of law was reinforced by the Court in *Gingles*, which requires Section 2 plaintiffs to establish a Section 2 violation before being entitled to relief.

In the case sub judice, the Eleventh Circuit has bypassed the legal principles and mandates established by the Court in *Gingles* and empowered the district court to

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[7] The fact that the Eleventh Circuit was not familiar with the factual presentation of the parties was shown at the oral argument of this case. There, the Honorable Peter T. Fay referred to the current commissioner as a "benevolent dictator" even though Respondents made no claim at trial that any commissioner had ever been unresponsive to the needs of minorities.

award Respondents the relief they seek even though the Respondents did not establish a Section 2 violation.

As this case was a reported decision, it is binding precedent in the Eleventh Circuit and will obviously be utilized within the circuit by other Section 2 plaintiffs to by-pass their burden of proof. Further, the decision will serve as persuasive authority in other circuits for Section 2 plaintiffs. This case will be precedent to empower district courts to expand and subdivide local governments. This will occur whether the claim is against one of the 19 counties in Georgia utilizing the sole commissioner form of government or whether it is a claim against any local form of government if it does not utilize a district system that gives rise to proportional representation. This was certainly not the intent of Congress. As noted by the Court in *Gingles*, the Senate Report accompanying the 1982 amendment clearly states "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation." 478 U.S. at 46.

X. CONCLUSION

For these reasons, Petitioners respectfully submit that the Eleventh Circuit decision is of such importance that it should be reviewed by the Court, and Petitioners respectfully request the Court to enter an order granting this petition for a writ of certiorari.

Respectfully submitted this 15th day of June, 1992.

R. Napier Murphy

§ 1973. Denial or abridgment of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

Rev. E.K. HALL, Sr. et al., Plaintiffs,

v.

Jackie HOLDER, et al., Defendants.

Civ. A. No. 85-242-2-MAC (WDO).

United States District Court,
M.D. Georgia,
Macon Division.

March 7, 1991.

Five registered voters brought action contending that Bleckley County, Georgia's single county commissioner form of county government violated Constitution and Voting Rights Act. The District Court, Owens, Chief Judge, held that county's sole commissioner form of government did not violate either Constitution or Voting Rights Act.

Judgment for defendants.

Christopher Coates, Milledgeville, Ga., Laughlin McDonald, Neil Bradley, Atlanta, Ga., for plaintiffs.

R. Napier Murphey, Cubbedge Snow, Jr., Martin, Snow, Grant & Napier, Macon Ga., W. Lonnie Barlow, Arnold & Barlow, Cochran, Ga., for defendants Jackie Holder and Robert Johnson.

ORDER

OWENS, Chief Judge.

In this civil action plaintiffs contend that Bleckley County's single county commissioner form of county government, which was established when the county was

created in 1912 and has continued without change, violates the Constitution of the United States and Section 2 of the Voting Rights Act.[1]

Plaintiffs are six black Bleckley County registered voters and the Cochran/Bleckley County Chapter of the National Association for the Advancement of Colored People. Defendants are Commissioner Jackie Holder, the incumbent sole county commissioner, and Probate Judge Robert Johnson who also serves as superintendent of elections. O.C.G.A. § 21-2-70.

Plaintiffs contend that Bleckley County should have more than one county commissioner, that each commissioner should be elected from and by the voters of a single member district, and that the black population resides in a contiguous area so that a safe black single member district can be created to give black citizens the opportunity to participate in the electoral process and to elect one or more county commissioners of their choice.

Following extensive discovery, a non-jury hearing was held on December 4-7, 1989. Thereafter the hearing was transcribed and the parties in May, 1990, submitted

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[1] This civil action was originally filed on July 17, 1985, under the Constitution and the Voting Rights Act, 42 U.S.C. § 1973, challenging (1) the method of electing the members of the Cochran City Council, (2) the district voting plan for members of the Bleckley County Board of Education, and (3) the sole commissioner form of county government. Plaintiffs' claims against the City of Cochran and the Board of Education were settled and a consent order was entered, leaving just this claim to be resolved.

lengthy, detailed proposed findings of fact and conclusions of law. All having been considered, the following constitutes the court's findings of fact and conclusion of law. Rule 52(a) Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Bleckley County, one of Georgia's 159 counties, was created by an amendment to Georgia's constitution in 1912. Its territory came from what was then Pulaski County. The amendment provided for a county government of one elected county commissioner. 1912 Ga.Laws 38. The state legislature in 1913 implemented the amendment and appointed the county's first commissioner to serve until his successor was elected and qualified. 1913 Ga. Laws 345.

2. Bleckley County encompasses some 219 square miles and is situated in rural Middle Georgia about 40 miles southeast of Macon.

3. From its creation in 1912 until today, Bleckley County has never varied from its present form of county government – one elected county commissioner. The powers and duties of the county government, also referred to as "the governing authority," are as specified by general state law, see O.C.G.A. § 36-5-22.1, applicable to all 159 counties without regard to the number of county commissioners each county may have. Bleckley County's sole county commissioner thus exercises all the powers and duties of the governing authority of Bleckley County.

4. The sole county commissioner form of county government is not unique to Bleckley County. Some 20 other Georgia counties have sole county commissioner forms of county government. See *The Macon Telegraph and News*, July 6, 1990.

5. In addition to having only one county commissioner, Bleckley County also has only one Sheriff, Probate Judge, Clerk of Superior Court, Tax Commissioner, Coroner, School Superintendent, County Surveyor and Magistrate, each of whom is elected by all the voters of Bleckley County.

6. According to the 1980 Census of Population, Bleckley County's total population was 10,767, having the following characteristics:

(a) By Race	–	Total Population
Black	2,367	22%
White	8,297	77%
Other	103	1%
Total	10,767	100%

(b) By Race	–	Voting Age Population
Black	1,474	19%
White	6,175	80%
Other	70	1%
Total	7,719	100%

7. At the time Bleckley County was created in 1912 and 1913 very few blacks, if any, could vote. There was no evidence presented at trial to suggest that the specific act

of creating Bleckley County's single member commission belied a racial motivation on the part of the Georgia Legislature. The sole commissioner form of government was not specifically selected for the purpose of further depriving already deprived blacks of the opportunity to vote or participate in the political process. The evidence does not show why the legislature chose the sole commissioner form of government.

8. Until the Civil Rights Act of 1957, 1960, 1964 and 1968 were passed by Congress and enforced by federal authorities, Bleckley County, in common with state and local government throughout much of the United States, enforced racial segregation in all aspects of local government – courthouse, jails, public housing, governmental services – and deprived its black citizens of the opportunity to participate in local government. After the Civil Rights Acts, segregation ended and is today no longer imposed by government.

9. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1953) and 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1954) ordered an end to segregated public schools. From the 1950's until around 1970, there was great public debate and discussion of desegregation, not just of public schools but of all public places. Candidates for public office during those years appealed for voter support by promising to oppose desegregation, but that practice ceased in the mid to late 1960's in Georgia and Bleckley County.[2]

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[2] Plaintiff Walker, President of the Bleckley County NAACP, testified that he was unaware of any open racial appeals in recent elections in Bleckley County.

10. The 1980 census and the well-founded opinions of plaintiffs' experts, Dr. Willingham and Dr. Engstrom, show conclusively that more black than white residents of Bleckley County continue to endure a depressed socio-economic status. This conclusion is mandated by census data showing, among other things, that: (1) 50% of the whites in Bleckley County have a high school education while less than 15% of the blacks have a high school education; (2) whites are more likely than blacks to own automobiles and have telephones; (3) the per capita income and median family income of whites is double that of blacks; and (4) while one-third of the blacks live below the federally recognized poverty level, only 9% of the whites do. This depressed socio-economic status hinders the ability of blacks to participate in the Bleckley County political process because, as Dr. Willingham opined: (1) better educated people are less threatened by having to make choices and are more likely to understand the importance of civic involvement; and (2) less educated people are more difficult to mobilize to vote even if they are registered to do so.

11. The depressed socio-economic status of black residents, including particularly the lack of public or private transportation, telephones and self-employment, hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process.[3]

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[3] The barriers to active participation in the political process are today compounded by the fact that Bleckley County now has only one voting precinct for the entire 219 square-mile area.

12. Local government is not responsible for arranging engagements for candidates for public office to speak to or be exposed to the voters of Bleckley County and is, therefore, not the cause of candidates having or not having the opportunity to be exposed to the members of church, civic or social groups. Churches, civic clubs and other social groups in Bleckley County – as in most of the United States – are generally racially and/or sexually exclusive, not because of state or local government but as the result of the personal preferences of the membership.

13. Until the voting Rights Act of 1965 was passed by Congress, black citizens were virtually prohibited from registering to vote in Bleckley County. Before the 1965 Voting Rights Act, 3,346 of the 4,528 voting age Bleckley County whites were registered to vote, but only 45 of the 1,380 voting age non-whites were registered. Immediately after the Voting Rights Act of 1965 Act passed white registration increased from 3,346 to 4,756 and non-white increased 600% from 45 to 287. (Plaintiff Exhibit 388). Since then, black voter registration has steadily increased so that today about 70% of the black voting age population is registered to vote – about the same as for today's white voting age population. (Defendants Exhibits 10-19).

14. In 1984, for the first time, black deputy voting registrars were appointed in Bleckley County, and black citizens were permitted to register in places where blacks normally congregate, such as the black Masonic lodge.

15. From 1978 to 1986, the defendant probate judge as the superintendent of county elections appointed 224

poll managers for some 17 elections; all of those appointed were white persons. He also appointed 509 poll clerks, only 30 of whom were not white. The probate judge's failure to appoint more minorities as poll managers and clerks is the subject of an unresolved lawsuit in this court. *NAACP of Cochran/Bleckley County, et al. v. Bleckley County, et al.*, 88-32-MAC (WDO). The evidence does not show that this practice has deterred blacks from voting.

16. While the legislature of this state has never altered Bleckley County's sole commissioner form of county government, the legislature in 1985 did submit to the voters of Bleckley County by referendum the question of whether or not Bleckley County should have a county commission of six county commissioners. 1985 Ga. Laws 4406. So limited was the electorate's interest in the referendum that only 25% of the eligible voters expressed any opinion with regard to the desirability of the proposed change. By a vote of 1,156 to 887, the voters on November 4, 1986, voted against a six commissioner commission. The voters did not perceive the referendum to be a black versus white issue and the vote was not racially polarized.[4]

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[4] Councilman Willie Basby, a black citizen and the councilman from Cochran's majority black city council district, testified as follows:

> Q: Mr. Basby, were you familiar with the 1986 referendum in Bleckley County to change the form of government?

(Continued on following page)

17. Neither the direct nor the circumstantial evidence shows that the sole commissioner form of government has been retained from 1912 until today for any particular purpose, racial or otherwise. The evidence does not show that the 1986 referendum was authorized for racial reasons; rather, local citizens, dissatisfied with *ad valorem* tax increases authorized by the sole commissioner who has the responsibility of settling *ad valorem* tax rates, generated the political influence that caused the legislature to authorize the referendum.

18. The evidence does not show that the sole commission form of government for Bleckley County has been retained for tenuous reasons. Defendant's expert testified that the citizens of Bleckley County rejected the referendum and preferred the single member commission because it is less expensive and satisfactorily responsive to the county's small size and population. In a January 25, 1984, article from *The Cochran Journal*, Councilman Basby stated in reference to whether the county should abandon

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(Continued from previous page)

A: Right.

Q: Was there any black interest, so to speak, any organized interest in the black community in that referendum?

A: I think so, but it was on a – it was very small.

Q: Was there any organized effort in the black community with regard to that referendum to vote one way or the other, any meetings?

A: Yes, it was (sic), but it was a small percentage of participation.

(Transcript pp. 320-21).

the sole commissioner system, "[l]arger counties obviously need a commission, but one person could be good for small counties if he's an active man and deals with all the people." (Plaintiffs' Exhibit 41). Plaintiffs do not claim nor does the evidence show that defendant Holder or the county commissioner's office, as structured, are unresponsive to the particularized needs of the black community in Bleckley County.

19. Until the Georgia legislature in 1964 enacted a state election code uniformly proscribing how all primary and general elections held in this state were to be conducted, primary elections were conducted by state and local political parties pursuant to rules adopted by each state or local party and at times selected by each state or local party. Under this system in Bleckley County primary elections a plurality of all votes cast determined the winner in most years; in some years a majority of all votes cast determined the winner. Immediately before adoption of the election code, the state and county democratic committees adopted a majority vote requirement. At that time many officials of this state expressed great concern over an emerging black vote.[5]

20. The state election code of 1964 required a majority vote for all state and county elections in this state.[6] Because of this general requirement Bleckley County's

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[5] One such legislator, Floor Leader Frank Twitty, warned the Georgia House that without legislation district elections in Fulton County would inevitably lead to the election of a negro. (Plaintiffs' Exhibit 228).

[6] O.C.G.A. § 20-2-501.

sole commissioner, like all public officials, is elected by majority vote. Whether the state-wide majority vote requirement violates the Voting Rights Act, any other law or the Constitution is the subject of a lawsuit pending in the Northern District of Georgia.

21. No black candidate has ever run in a primary or general election for sole commissioner of Bleckley County.

22. The evidence does not show that any candidate slating process exists in Bleckley County.

23. Prior to the election of school board members from single member districts and the election in 1986 of Reverend Hall, a black who ran against a black in a majority black district, only one black had ever run for a county-wide office – in 1984 Reverend Hall unsuccessfully opposed incumbent Robert Johnson for probate judge.

24. If the county commission were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority "safe" district – the same district Reverend Hall was elected from – would result.

25. Neither the plaintiffs nor the defendants produced data showing a relationship between the race of Bleckley County voters – white or black – in election contests for county offices and the way in which the voters voted; such data is simply not available. Instead, they each rely upon the success and/or failure of white

and black candidates in attracting the votes of Bleckley County voters in other than county office elections.

Lester Maddox, an avowed racist, ran for governor in 1964 as a Democrat against Republican Howard H. "Bo" Callaway. Bleckley countians voted 1,906 for Maddox, 870 for Callaway and 25 write-ins for Arnall. In 1974, J.B. Stoner, also an avowed white racist, ran for Lt. Governor in the state-wide Democratic primary election and in Bleckley County got around 20% of the total county vote compared to 9% of the total state vote. The evidence does not show how many whites or blacks voted for Mr. Stoner or Mr. Maddox.

In 1984, when Bleckley County had eight election precincts, Jesse Jackson ran in the Democratic presidential preference primary. In Bleckley County and statewide, the results were:[7]

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[7] See Court Exhibit 1, Secretary of State's Election Report.

DEMOCRATIC PRESIDENTIAL PREFERENCE PRIMARY

Candidate:	Bleckley County Vote:		State Vote:	
Askew	1	.05%	1,660	.24%
Cranston	4	.24	923	.13
Glenn	324	19.30	122,744	17.93
Hart	529	31.60	186,903	27.30
Hollings	19	1.14	3,800	.56
Jackson	150	8.90	143,730	21.00
McGovern	46	2.80	11,321	1.65
Mondale	583	34.80	208,588	30.47
Willis	6	.36	1,804	.26
Uncommitted	9	.54	3,068	.45
Total	1,671		Total 684,541	

REPUBLICAN PRESIDENTIAL PREFERENCE PRIMARY

Reagan	87	50,793

A homogeneous precinct and bivarate regression analysis of the 1984 presidential preference primary election in Bleckley County shows that Jesse Jackson received some 60.8% of the black vote and some 0.9% of the white vote.

In 1984, there were 958 registered black voters and 4,549 registered white voters in Bleckley County. In addition, there were 140 registered voters of other races. The evidence does not show why only 1,671 of the 5,647 registered voters went to the polls.

Reverend Jackson again ran in the 1988 Presidential Preference Primary. In the interim between 1984 and 1988 Bleckley County elections were consolidated into one voting precinct. A regression analysis of the type conducted with regard to the 1984 election was no longer possible. However, the court takes judicial notice of the official election results offered by neither plaintiffs nor defendants which show the following breakdown of votes case [sic] in that primary:[8]

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[8] See Court Exhibit 2, Secretary of State's Election Report.

DEMOCRATIC PRESIDENTIAL PREFERENCE PRIMARY

Candidate:	Bleckley County Vote:		State Vote:	
Babbitt	28	1.58%	3,247	0.52%
Dukasis	210	11.82	97,179	15.61
Gephardt	202	11.37	41,489	6.66
Gore	933	52.50	201,490	32.36
Hart	109	6.13	15,852	2.55
Jackson	250	14.07	247,831	39.80
Simon	13	0.73	8,388	1.35
Uncommitted	32	1.80	7,276	1.17
Total	1,777		Total 622,752	

REPUBLICAN PRESIDENTIAL PREFERENCE PRIMARY

Bush	345	44.06%	215,516	53.75%
Dole	245	31.29	94,749	23.63
DuPont	2	0.26	1,309	0.33
Haig	3	0.38	782	0.20
Kemp	47	6.00	23,409	5.84
Robertson	141	18.01	65,163	16.25
Total	783		Total 400,928	

In 1988, there were 4,225 registered white voters and 1,024 registered black voters in Bleckley County.

In 1988, an exit poll was conducted at the direction of plaintiffs' expert, Dr. Willingham at Bleckley County's sole voting precinct.[9] The poll, labelled a "sample ballot," unlike the actual ballots used in the primary simply listed the slated candidates for president from *both* political parties.[10] In addition to a section which identified the Southern Regional Council, of which Dr. Willingham was a member, as an independent group taking the poll and instructions on how to fill out the sample ballot, the sample ballot included the following question:

VOTER SURVEY

Please check or mark the appropriate boxes below and fill in the blank space.

Race: ○ White ○ Black

Sex: ○ Male ○ Female

_____ years old.

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[9] Dr. Willingham was not present at the polling place, and so was unable to answer from personal knowledge defense counsel's questions with regard to whether the exit poll was executed based upon random sampling techniques and as to what approach was used by those distributing the poll.

[10] The court also notes that despite the fact that the sample ballot listed the names of the presidential candidates, it instructed voters "Please check or mark the names of those for whom you voted in the regular *Mayor/Council election* on the sample ballot." (Plaintiffs' Exhibit 390) (emphasis added).

Do you believe voters tend to vote along racial lines in Bleckley County elections?

O Yes O No

(Plaintiffs' Exhibit 390).[11] The exit poll was supervised by Miss Chris Carrea, who did not testify at the trial.

Dr. Willingham testified that pollsters were instructed to attempt to distribute the sample ballots to as many voters as they could. According to Plaintiffs' document "Results of the Exit Poll at a Glance," (Plaintiffs' Exhibit 390), 993 voters responded to the poll; their preferences broken down as follows:

REPUBLICANS

George Bush	119
Bob Dole	86
Pete du Pont	1
Alexander M. Haig	0
Jack Kemp	19
Pat Robertson	68

[11] The parties do not reference this portion of the exit poll in their respective briefs and the court gives no credence to any evidence which might have been drawn from a question eliciting a legal opinion from Bleckley County voters.

DEMOCRATS

Bruce Babbitt	3
Michael Dukakis	81
Dick Gephardt	51
Albert Gore	319
Gary Hart	39
Jesse Jackson	161
Paul Simon	2
Uncommitted Preference	12
Declined to Answer	20
Marked Two Candidates	12[12]

The exhibit also includes a breakdown of expressed preferences by voter race. Of the 161 voters preferring Jesse Jackson, 145 were black, 11 were white, and 5 were of a race other than black or white. In sum, of those who expressed a preference, 1.3% of whites, 92.3% of blacks, and 17.8% of other races supported Jesse Jackson.

In 1988, all voters voted in one precinct in Bleckley County. In the absence of muiti-precinct data a bivarate regression analysis could not be performed. The exit poll, however, does indicate that Jesse Jackson was again the

[12] The "uncommitted preference" was one of the choices on the sample ballot; plaintiffs listed these responses separate from those who simply refused to fill out a sample ballot. The court also notes that the exhibit which plaintiffs' counsel identified as the breakdown for votes county-wide is headed "(Cochran)." Because the votes set out on this exhibit equal the total number of voters responding, 993, the court assumes that this document, indeed, reflects exit poll responses for all of Bleckley County's voters who responded.

choice of most black Bleckley County voters and not the choice of most white voters.

The City of Cochran is in Bleckley County. In 1980, it had 5,121 residents of whom 1,704 were black (33%). Until 1986 and the division of the city into single member districts, one of which was 73% black, only one black – Willie Basby – had been elected at-large by plurality vote of the voters of Cochran. Other blacks – David Walker and Mattie McDonald – ran at-large for city council and lost.

Basby attracted the following votes against the following white candidates:

1972	Crooms (W)	688
	Basby (B)	439-Lost
1973	Dixon (W)	249
	Lucas (W)	177
	Basby (B)	277-Won
1975	Greer (W)	405
	Basby (B)	379-Lost
1977	Giddings (W)	403
	Tomberlin (W)	55
	Basby (B)	467-Won
1979	Justice (W)	228
	Basby (B)	521-Won

1981 to date – Basby – unopposed

Judge Benham, an incumbent black Georgia Court of Appeals judge, carried Bleckley County in a recent election. In past elections other black candidates – C.B. King in 1972; Mildred Glover in 1982; and, Otis Smith in 1988 –

for state-wide offices received very few votes in both Bleckley County and state-wide.

After the City was divided into single member districts, Reverend Roberson, a black citizen, ran for city council against a white opponent. In the district there are some 300 white (27%) and 800 black (73%) registered voters. Reverend Roberson won 492 (84%) to 96 (16%).

26. No credible evidence was available to estimate support for most of these candidates from the black and white communities, respectively. From these facts it is apparent that from time to time black and white voters prefer different candidates, but the evidence is insufficient to demonstrate and this court cannot find that there is a consistent relationship between the race of Bleckley County voters and the way – for whom – they vote.

The opinions of the experts to the contrary not accepted. They are based upon insufficient data and upon their preconceived notions that voters in Bleckley County, like voters all over this Nation, when presented with black and white candidates choose a candidate of their own race. (Tr. pp. 384, 434).

DISCUSSION

Section 2 of the Voting Rights Act of 1965, as amended June 29, 1982 ("the Act"), 42 U.S.C. § 1973, *et seq.*, affords a remedy to plaintiffs who successfully demonstrate an inequality traceable to a particular law, practice, or structure based either upon a discriminatory intent in its original or continued implementation or upon proof that the law, practice, or structure results in

denial or abridgment of any member of a protected class' right to vote. *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S.Ct. 2752, 2762, 92 L.Ed.2d 25, 42 (1986). The Act provides in part:

> (b) A violation of [the Act] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [the Act] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of the protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b).

The court will first address plaintiffs' claims arguing that the single county commissioner form of government was enacted and has been maintained in Bleckley County with the intent to preclude members of the black community from enjoying equal access to the political process. The court will then analyze the relevant evidence with regard to whether Bleckley County's single commissioner form of government does, in fact, result in an abridgment to equal participation by the black community.

I. CONSTITUTIONAL CHALLENGE

This court first notes that even those cases which have led to the development of the discriminatory results test and those employing the results analysis, addressed *infra*, have drawn upon a wealth of evidence of past discrimination as well as evidence of electoral returns which demonstrated that the challenged practice or procedure worked to perpetuate past discrimination. Plaintiffs' suggestion that Georgia politics has seen the rise and fall of many racist politicians without more cannot amount to evidence that a particular enactment is tainted with racial animus. *See Vereen v. Ben Hill County*, 743 F.Supp. 864, 869 (M.D.Ga.1990) (citing *Hunter v. Underwood*, 471 U.S. 222, 233, 105 S.Ct. 1916, 1922, 85 L.Ed.2d 222, 231 (1985)). To prevail upon its specific claims that the single member county commission was enacted or has been maintained based upon an intent to exclude or limit the influence of the black community, plaintiffs must present the court with greater evidence than conglomeration of newspaper clippings from Georgia newspapers and local resident reminiscences of this state's struggle to cast off the bonds of segregation. Plaintiffs must present credible evidence either that the Georgia Legislature had a discriminatory purpose in creating Bleckley County's single member commission or credible evidence that the single member commission has been maintained to effectuate a discriminatory purpose. This they have not done.

Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1550 (11th Cir.1987), *cert. denied sub nom., Duncan v. Carrollton*, 485 U.S. 936, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988), provides an example of the type of evidence required to

demonstrate a racial motivation behind a particular enactment. In *Stallings*, the Eleventh Circuit emphasized the importance of the plaintiffs' historical evidence that defendant Carroll County had in 1947 sought to *re-establish* a one person commission. Representative Willis Smith of Carroll County, in a speech to the Georgia Assembly favoring the reinstatement of single member commission in Carroll County, stated:

> Georgia is in trouble with the Negroes unless this bill is passed. This is white man's country and we must keep it that way.

Stallings, 829 F.2d at 1551.

There is no evidence in the record to demonstrate that the creation of Bleckley County or its single member commission in 1912-13 stemmed from a racial or discriminatory motivation. Unlike Carroll County in *Stallings*, Bleckley County's single member commission has been the exclusive form of government since the county's inception. Plaintiffs have put forward neither evidence of lobbying of the type found in *Stallings*, nor any similar evidence in support of a claim that the creation or maintenance of the single member commission in Bleckley County evidences intend [sic] to discriminate. The charter of Bleckley County and the creation of its single member commission were not proven to be the product of a specific, or even general, racial motivation.

Plaintiff's expert, Dr. McCrary, testified that in his research pertaining to the years 1946-1964 he found no articulation of a racial purpose for the maintenance of the sole commissioner form of government in Bleckley County. The court finds this particularly significant given

the wealth of evidence presented by plaintiffs which suggests that racial views and motives, where felt, were topics of open expression during this time period. The open expression of racist sentiments was reflected in various newspaper articles such as *Valdosta Daily Times* articles quoting various legislators in 1962.[13] Whether or not the system in Bleckley County was maintained for such a purpose or not is a matter of the purist speculation. Without specific evidence that the system was maintained to effectuate an intent to dilute minority participation, plaintiffs' claim must necessarily fail.

At trial, the only evidence with regard to more recent elections and politics in Bleckley County addressed the lack of open racial issues or appeals in those elections and the 1986 referendum on the proposal to abdicate the single member commission.[14] The 1986 referendum was rejected and the single member commission retained by a majority of the votes cast (the vote was 1,156 to 887). 1987 Ga.Laws CCLXXII. So limited was the electorate's interest in altering the commission's structure, that only approximately 25% of the eligible voters expressed any opinion with regard to the desirability of the proposed change. The Bleckley County Grand Jury recommended the referendum because of dissatisfaction in the county with a

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[13] *See, e.g.*, n. 5, *supra*.

[14] *See* n. 2, *supra*. The exception, of course, would be the presidential campaign of the Reverend Jesse Jackson. *See* n. 29, *infra*.

recent tax increase. Defendant's expert, Dr. Loftin, testified that in her personal opinion, as a historian and resident of Bleckley County since 1969, the citizens of Bleckley County rejected the referendum and preferred the single member commission because it is less expensive and satisfactorily responsive to the county's small size and population.[15]

The testimony of Councilman Basby at trial further demonstrates that others in the black community, when presented with an opportunity to express an opinion on the proposed change in the commission size, may have shared his sentiments. *See* n. 3, *supra*. While the overall disinterest in the referendum is not grounds to disregard plaintiffs' arguments favoring an enlarged commission, the limited response and Councilman Basby's opinions do suggest a variety of viewpoints within the black community with regard to the attractiveness of a multi-member commission.

The underwhelming response of Bleckley County voters to the referendum coupled with the lack of evidence from either plaintiffs or defendants to demonstrate that race played even a minor role in the referendum campaign indicates a general perception in the community that the referendum results were the product, not of racial motivations, but of a generally held perception favoring a vote against expanding the size of the government: a sentiment which knows no racial barriers. This court has heard no credible evidence to support plaintiffs' arguments that the referendum itself evidences the

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[15] See FACTS, ¶18, *supra*.

alleged discriminatory purpose to maintain the county commission in its present form.

Plaintiffs also complain that the majority vote requirement used in Georgia to govern primary elections was implemented and has been maintained for the purpose of diluting minority voting. There was no evidence presented at trial to suggest that Bleckley County exercised any control over the implementation of the majority vote requirement. Again, the issue of whether the statewide majority vote requirement violates the Voting Rights Act, any other law or the Constitution is the subject of the above referenced case in the Northern District of Georgia. This issue is not properly before the court in the case *sub judice*.

The evidence presented at trial and history demonstrate that no county has ever itself exercised control over the electoral process. County elections have long been subject to the whims and control of the Georgia Legislature. *See, e.g., Vereen*, 743 F.Supp. at 866-67, n. 4 (1872 Georgia Legislature, concerned about black gains in political power, simply abolished elections for county commissioner in majority black McIntosh County). The term "maintenance" suggests a power to dismantle if the authorized body so chooses; in the case *sub judice*, Bleckley County had neither the power nor the authority to alter the majority vote requirement. Whether or not the county might have been inclined to abandon the system or tacitly approved of it is a matter of speculation and has no bearing upon the plaintiffs' claims.

While the facts that racism and segregation are part of the history of the South and the nation, and that these

are problems yet subject to full redress nationwide, are not matters subject to quibbling, this court cannot, based simply upon the existence of racial tensions in this country, charge every piece of legislation and every political process carried out with being specifically tainted by discriminatory intent. Plaintiffs in the case *sub judice* have failed to provide any evidence that Bleckley County's single member county commission is the product of original or continued racial animus or discriminatory intent.

II. DISCRIMINATORY RESULTS

The essence of a vote dilution claim such as the one remaining before the court is that the identified electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S.Ct. 2752, 92 L.Ed.2d 25, 44 (1986).[16]

In *Gingles*, the Supreme Court set forth the manner in which a trial court should evaluate a § 2 results claim. The Court set out both the analysis formulated by Congress and a new three part test for analyzing vote dilution claims under Section 2 of the Act. *Gingles*, 478 U.S. at 37-38, 48-51, 106 S.Ct. at 2759, 2765-67; *see also Stallings*, 829 F.2d at 1550 (the *Gingles* test focuses on the existence

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[16] The intent test of the Act is concentric with the analysis of the Constitutional grounds for recovery asserted by plaintiffs. It is the unconstitutional motivation in enacting or maintaining the system which amounts to a violation. Evidence of racial intent has been considered as one complete analysis, *supra*.

of a politically cohesive geographically insular minority group and voting along racial lines as necessary preconditions to successful voting impairment claims).[17] The necessary preconditions are:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district;[18]
>
> Second, the minority group must be able to show that it is politically cohesive; and[19]
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently – in the absence of special circumstances, such as the minority candidate running unopposed, . . . – usually to defeat the minority's preferred candidate.

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[17] The *Stallings* case is, again, of particular interest to this court as it involved a challenge to Carroll County's single member commission form of government.

[18] In the case *sub judice* plaintiffs argue that if the existing single member commission were enlarged to three or more members, each representing a separate district, the black community is sufficiently geographically compact to constitute a majority in such a district.

[19] The similarities between racial bloc voting and this second tier of analysis can be seen in the *Stallings* court's statement in dicta that "proof of racial polarization may, of course, be found sufficient by this Court to make the necessary finding of cohesiveness." *Stallings*, 829 F.2d at 1563; *But see Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*, 906 F.2d 524, 526-27 (11th Cir.1990) (despite proof of bloc voting by whites, class failed to prove political cohesiveness of black and hispanic voters in jurisdiction).

Gingles, 478 U.S. at 48-51, 106 S.Ct. at 2765-67 (*citing* Blacksher & Menefee, From *Reynolds v. Sims* to *City of Mobile v. Bolden*, 34 Hastings Law Journal 1 (1982)).

Senate opponents to the 1982 amendment to the Act expressed fears that a change in the Voting Rights legislation would lead to "a requirement of racial quotas, or an all-out assault on at-large election systems in general." S.Rep. 97-417 at 27, U.S.Code Cong. & Admin.News 1982, pp. 177, 205. To insure that this result did not obtain, the Act includes the following language:

> *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b). As an additional barrier to unattractive, mechanical results such as quotas, the Senate left to the trial court the latitude to consider a variety of factors. S.Rep. at 28.[20] The Senate Committee specifically stated:

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[20] The Senate Report lists the "typical" factors to be considered as follows:

"1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register to vote, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for

(Continued on following page)

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used as a mechanical 'point counting' device . . . Rather, the provision requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case . . .

(Continued from previous page)

discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction." S.Rep. No. 417 at 28-29, U.S.Code Cong. & Admin.News 1982, pp. 206, 207.

The Senate Report also lists the following as additional relevant factors:

"whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and

"whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.*

Id. at 29 n. 118,[21] U.S.Code Cong. & Admin. News 1982, p. 207 n. 118.

Section 2 protects the right of minority voters to be free from election practices which deny them the *same* opportunity to participate in the political process as other citizens enjoy, S.Rep. at 28 (emphasis added); it does not mandate proportional percentage representation by race. Obviously, then, a successful claim is contingent upon evidence that it is, indeed, the practice to which an objection is raised that works to deny minorities that equal access. "The ultimate determination of vote dilution is a question of fact to be resolved under the totality of the circumstances." *Solomon,* 899 F.2d at 1015-16, n. 6. (Kravitch, concurring specially) (*citing Gingles,* 478 U.S. at 79,

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[21] *See also Solomon v. Liberty County,* 899 F.2d 1012, 1033 (Tjoflat, specially concurring) ("[T]he primary objection in the Subcommittee on the Constitution to the House bill was the perceived lack of a threshold requirement to the results test. Without such a requirement, the Subcommittee members feared, a plaintiff could mechanically prove one objective factor and win under the new language, not leaving the defendant any opportunity to rebut the plaintiffs' case") (*citing* Subcomm. on the Constitution to the Senate Comm. on the Judiciary, Voting Rights Act: Report of the Subcommittee on the Constitution, *appended to* S.Rep. No. 417, 97th Cong., 2d Sess., *reprinted in* 1982 U.S.Code & Admin.News 278, 309).

This court is mindful that in cases where a plaintiff can show that an electoral scheme was purposefully adopted or maintained to weaken a minority group's political influence, a test less stringent than *Gingles* might apply. *See Solomon,* 899 F.2d at 1017, n.5 (Kravitch, specially concurring). Given this court's determination that plaintiffs have failed to demonstrate discriminatory intent, any such less stringent test need not be considered here.

106 S.Ct. at 2781). The *Gingles* test and the Senate Factors from which it was drawn ensure that a successful vote dilution claim must be based upon nothing less than evidence that, because of its submergence in a predominately white district, a geographically compact, politically unified minority electorate's choices at the polls are impeded and defeated by the voting scheme. *Stallings,* 829 F.2d at 1563; *Gingles,* 478 U.S. at 51, 106 S.Ct. at 2766-67.

A. Applying the *Gingles* Test

1) Racial Bloc Voting

The plaintiffs do not present evidence of local office elections where black candidates or candidates harnessing the support of the black community suffered defeat attributable to the votes cast by a white or majority voting bloc. The present claim is not based upon statistical evidence of polarized voting in elections for local office.[22] In fact, the most pronounced evidence *offered by plaintiffs* with regard to a local election involving at-large voting amounts to an electoral anthology of the triumphs of Cochran City Councilman Willie Basby ("Councilman

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[22] The court does note the plaintiffs' contention that the county's decision to consolidate the separate voting precincts into one county-wide voting precinct has resulted in difficulty in analyzing the racial composition of voting in the county. The court does not mean to suggest that plaintiffs have failed to present all available evidence, the court simply argues with plaintiffs' expert, Dr. Willingham, that this case involves a "paucity of statistical information regarding racial bloc voting" in Bleckley County. (Transcript p. 357).

Basby"), a black citizen appearing as a witness for the plaintiffs.

Plaintiffs state that given the racial demographics of Bleckley County, "it would be necessary for a candidate, whether he or she be black or white, who is supported by black voters to receive substantial white voter support in order to win a sole commissioner race." (Plaintiffs' Proposed Findings of Fact ¶16). Indeed, Councilman Basby stated:

> " . . . a small town in Georgia (Cochran), you have to be known by blacks and whites to get elected for public office; therefore, you need a percentage of all black and white to get elected." (Transcript p. 312)[23]

Basby, a veteran of local elections dating back to the early 1970's, went on to say that personal contact is the most important aspect of running for elections in Cochran and Bleckley County. (Transcript pp. 312-13).

It appears that the testimony of Councilman Basby serves less as evidence of racially polarized voting and more as a lesson in the dynamics of grass roots political campaigning. Nothing in the plaintiffs' evidence drawn

[23] The court takes into account Councilman Basby's further statement "in the City of Cochran has began to work better, but now, when you're talking about at-large in the County election, it's different because you got more people to deal with." (Transcript p. 320).

from elections for local office leads this court to a conclusion that voting on local levels is racially polarized.[24]

Exogenous Elections

Plaintiffs, conceding that Reverend Hall is the only black candidate to have run for county office, premise their arguments that racial bloc voting infects the electoral process in Bleckley County upon evidence drawn principally from statistical analysis of the 1984 and 1988 Democratic Presidential Primaries, specifically the campaigns of the Reverend Jesse Jackson, and an exit poll conducted during the 1988 election.

Of course, the fact that plaintiffs' evidence in this area relates only to exogenous elections does not doom their case. *See Gingles*, 478 U.S. at 57 n. 25, 106 S.Ct. at 2770 n. 25 ("Where a minority group has never been able to sponsor a candidate, plaintiffs could rely on other

[24] The court does not mean to imply that it considers the track record of Councilman Basby as rebuttal evidence against a showing that blacks have not fared well in elections in Bleckley County. This would be improper as these elections did not involve the same countywide electorate involved in the commissioner elections. *Stallings* 829 F.2d at 1560 ("The district court's reliance on municipal elections in [the county] as proof of minority electoral success of a county electoral scheme is obviously misplaced"). The court does note, however, that in a case characterized by a paucity of evidence derived from local elections, the plaintiffs themselves offer a witness who has enjoyed electoral success despite white opponents in those elections, city elections requiring only a plurality for election. The court also takes note of the city council elections in which other black candidates did not fare so well, i.e., plaintiff Harris (1977), plaintiff Hall (1978), etc.

factors that tend to prove unequal access to the electoral process"); *see also Westwego Citizens for Better Government v. Westwego*, 872 F.2d 1201, 1209 n. 8 (5th Cir.1989) ("[P]laintiffs may not be denied relief simply because the absence of black candidates has created a sparsity of data on racially polarized voting in purely indigenous elections.") The *Gingles* Court envisioned circumstances where a trial court would be called upon to engage in analysis beyond mere observation of the statistical data compiled from local office elections.

Prior to the *Gingles* decision, the Eleventh Circuit, in applying the Senate factors, specifically held that the fact that no black has run for the particular office does not *per se* weaken a claim under the Act. *See McMillan v. Escambia County*, 748 F.2d 1037, 1045 (5th Cir.1984) (court noted that the lack of a black candidate may be the result of a racially discriminatory system); *Accord Westwego*, 872 F.2d at 1209-10 (court specifically validated the use of statistical data from the 1984 Jesse Jackson campaign, in addition to local election returns, as a "local appraisal" to establish some degree of racial bloc voting); *Citizens For a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir. 1987) ("Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections [the office subject to the plaintiffs' challenge], the district court properly considered them *as additional evidence of bloc voting* – particularly in light of the sparsity of available data") (emphasis added).[25] To the extent that

[25] the court notes that in *Westwego*, the Louisiana district court, like the court in *Gretna*, was presented with evidence from the Jesse Jackson campaign *in addition to* evidence drawn from local elections involving black candidates in parish-wide elections. *See Westwego*, 872 F.2d at 1209.

such evidence is established and properly presented, plaintiffs may rely upon evidence drawn from elections other than those for the office in question or those limited to the local jurisdiction alone, as evidence that elections in the jurisdiction evidence racially polarized voting.[26]

The evidence presented in the case *sub judice* with regard to the Jesse Jackson campaigns was delivered through experts and their respective contradictory opinions as to what, if anything, the available statistical analyses revealed about Bleckley County Voters. Dr. Willingham, plaintiffs' expert, himself noted that the electoral evidence in the case *sub judice* is not ideal in scope or magnitude. He stated:

> Ordinarily, one would have had as one's resource statistical information or at least voting data which could then have been subjected to statistical analysis which would have resulted in objective statistical measures of racial bloc voting. That is present in this county that only one – in only one instance and that's the instance of 1984 where there was both the black candidate running countywide and a series of precincts.

[26] The court does find it curious, given the *Gingles* requirement that "the minority must be able to demonstrate that the white majority votes sufficiently – in the absence of special circumstances, such as the minority candidate running unopposed, . . . – *usually* to defeat the minority's preferred candidate." *Gingles*, at 48-51, 106 S.Ct. at 2765-67, 92 L.Ed.2d at 45-47 (emphasis added), that plaintiffs offer evidence drawn primarily from only two isolated elections for an office centered outside of Bleckley County, specifically evidence from the 1984 and 1988 Presidential Primaries, as evidence of racially polarized voting in Bleckley County.

> And for that, racial regression analysis is possible. There is no other election that fits the – that matches those conditions and for the reason, *a key way of explaining and talking about racial bloc voting was not available to the court in this particular case.*

(Transcript, pp. 375-76) (emphasis added).[27] Not surprisingly, this is one area where defendants' expert shares the views of those put on by the plaintiffs. In pointing out that endogenous elections are a preferable source of evidence, Dr. Wildgen stated, "[a]s one moves out from the challenged mechanism itself . . . there is a scientific and an obvious logical requirement to establish some plausible connection between what happens in one office and how it might bear on what happens in a second office." (Transcript p. 678).

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[27] Dr. Engstrom conducted the ecological regression analysis upon Bleckley County returns in the 1984 presidential primary. He, too, agreed that exogenous elections are not the ideal source for an expert to analyze.

> Q: Do you agree that exogenous elections, such as this race (the 1984 presidential primary), are less probative of the question of vote dilution in the challenged election system?
>
> A: Oh, I would prefer to have contests in the challenged election system involving choices between black and white candidates, yes.

(Tr. 472-73). *See also Citizens for a Better Gretna v. Gretna*, 636 F.Supp. 1113, 1126 (E.D.La. 1986) *aff'd* 834 F.2d 496 (5th Cir.1987) *cert. denied* 492 U.S. 905, 109 S.Ct. 3213, 106 L.Ed.2d 564 (Dr. Engstrom, as plaintiffs' expert, conducted analysis of 1984 Jackson campaign, but also analyzed evidence from a statewide race for Secretary of State as well as two elections for the challenged office itself).

Despite the fact that it is called upon to analyze data and evidence drawn by plaintiffs from sources other than returns from elections for local office, as stated above, this court does not read the law in this area to allow defendants the opportunity to explain the electoral motivations underlying this broader range of evidence. Consistent with *Collins*, this court does not and will not seek to look behind the bare evidence to "ask why those votes were cast the way they were nor whether there were other factors present in contested elections, such as 'white backlash.' " *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 935-936 (4th Cir.1987); *see also Stallings*, 829 F.2d at 1557-59 (defendants may not rebut plaintiffs' prima facie case of racial bloc voting with evidence of causation or intent).

Unification of the minority electorate was the hallmark of Reverend Jackson's "Rainbow Coalition" in the 1984 and 1988 Presidential Elections. Reverend Jackson's message depended upon an active, involved, cohesive minority electorate.[28] While theGcases [sic] stating that

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[28] The testimony of plaintiffs' expert, Dr. Willingham was as follows:

> Q: Mr. Willingham, I believe you wrote an article which was published in *Southern Politics* called *"Voter Participation is Now the Challenge,"* is that correct?
>
> A: Sounds like something I'd write.
>
> Q: You expressed in your article your opinion that the Jesse Jackson campaigns placed heavy emphasis on race in its (sic) mobilization drives, and you would agree with that today, wouldn't you?
>
> A: Yes, I would. (Transcript pp. 394-95).

the existence of racially polarized voting establishes the cohesiveness of the minority group are legion, *see, e.g., Collins* 816 F.2d at 935, the Jesse Jackson campaigns may actually represent situations where the conscious unification of the minority community may have actually created the perception of bloc voting by the majority.[29] In essence, the progression is reversed; the mobilization of a cohesive minority electorate may work to create the perception of the existence of racially polarized voting.[30]

The 1984 Presidential Preference Primary

Dr. Engstrom testified that the regression analysis, conducted with regard to the 1984 Jesse Jackson campaign returns in Bleckley County, related observations of two variables: the percentage of voters signing in who

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[29] Consider the testimony of defendants' expert, Dr. John Wildgen.

> "Q: In 1984, did Jesse Jackson do well among black voters across the country?
>
> A: Yes.
>
> Q: Did he do well in areas that, in your opinion, were not otherwise racially polarized?
>
> A: Yes. As far as I know, on a nationwide basis, Jesse Jackson attracted an appreciable amount of the black vote . . . " (Transcript pp. 683-84).

[30] The political campaigns of the Reverend Jackson may in reality yield aberrant information if one seeks to determine sustained voting patterns in Bleckley County or in any other jurisdiction for that matter. *See Gretna,* 834 F.2d at 502.

were black and the percentage of voters signing who voted for Reverend Jackson. Through the use of a "scattergram" or "scattered plot," Dr. Engstrom testified that he conducted a weighted regression which, according to Dr. Engstrom, demonstrated that the higher the black presence in a precinct the higher the percentage of votes cast for Jesse Jackson.[31] A homogeneous precinct analysis, or analysis of the precincts with 90% or more white voters, also revealed that Jesse Jackson received the fewest votes of any candidate in those precincts.

Dr. Engstrom estimated Reverend Jackson's support among black voters to be 60.8%; among white voters Reverend Jackson carried just an estimated 0.9% of the votes cast. His estimates, drawn from the regression, were virtually identical to the *CBS News/New York Times* exit poll for Georgia which estimated that Reverend Jackson received 61% of black votes and 1% of the white vote statewide. The regression analysis demonstrates that white and black voters did not agree upon whom the democratic party should nominate. Jesse Jackson enjoyed the electoral support of a majority of black voters; very few white voters supported Jesse Jackson.

The 1988 Presidential Preference Primary

Drs. Willingham and Engstrom both concluded from their research and analysis that the results of the 1988

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[31] Defendants point out that Dr. Engstrom's testimony and analysis did not include analysis of the margin for error in order to support his conclusion with regard to the estimates as to a proportional increase between black voter percentage and black voter support.

presidential primaries revealed that voting in Bleckley County is racially polarized. Neither Defendants nor their expert agree with that conclusion.

Dr. Wildgen first levelled his criticisms at the method employed or, more appropriately, at the absence of any identifiable method used in implementing the voting poll. He suggests that Dr. Willingham's study diverged from standard practices in exit polls. Rather than attempting to distribute sample ballots to every voter, Dr. Wildgen suggests that a proper "poll" would be contrived upon notions of eliciting responses to a sample ballot that was the mirror image of the actual presidential preference ballot. Dr. Willingham's study was more akin to a census. However, by Dr. Willingham's own testimony, the ballot, unlike a census, was not distributed to all of the voters, nor did all or even a majority of the voters respond. Dr. Wildgen concluded, "so what we have here is a sort of half-breed collection of information that is not amenable to either census type analysis or to statistical analysis." (Transcript p. 691).

The actual results of the 1988 presidential preference primary were again as follows:

REPUBLICANS

George Bush	345
Bob Dole	245
Pete du Pont	2
Alexander M. Haig	3
Jack Kemp	47
Pat Robertson	141

DEMOCRATS

Bruce Babbitt	28
Michael Dukakis	210
Dick Gephardt	202
Albert Gore	933
Gary Hart	109
Jesse Jackson	250
Paul Simon	13
Uncommitted Preference	32[32]

A quick comparison of these results with the results projected by Dr. Willingham's poll reveals some interesting points. Using a poll that reached 993 voters, or 37.9% of the total number of voters casting ballots, Dr. Willingham sought to accurately estimate the breakdown of voter support by race. The evidence indicates that his poll failed to achieve this goal.

Were the poll truly representative of the votes actually cast there would logically be some consistency between the responses to the poll and the actual returns.[33] Yet, it is clear that the results of the poll were unrepresentatively skewed. When one compares the preferences expressed in the poll with those actually expressed in the election, it becomes evident that the poll overemphasized the electoral support received by some

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[32] The total number of Bleckley county residents voting was 2620 out of 5,327 registered voters.

[33] Dr. Willingham testified that there was no random sample technique used nor was there advance planning for a margin of error in the poll. (Transcript p. 401-02). Rather the naked results of the survey were intended as a reflection of the actual support distribution in the election.

candidates, most importantly Reverend Jackson, and underestimated the support harnessed by other candidates.

For example, 16.2% of those voters reached by the poll supported Jesse Jackson.[34] Using this percentage figure, one would expect that around 16% of the actual votes cast would support this candidate, or approximately 420 votes. However, of the 2,620 votes cast, Reverend Jackson received only 250 votes, or 9.5% of the total votes cast.[35] Plaintiffs themselves suggest that the pollsters apparently attracted a disproportionately high number of Jesse Jackson supporters. (*See* "Plaintiffs' Response to Defendants' Proposed Findings of Fact and Conclusions of Law," ¶ 6, p. 7).[36]

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[34] This percentage figure is actually lower than Jesse Jackson's actual poll support compared to all those actually expressing a preference for one candidate or marking the uncommitted preference (the only options available on the actual ballots); compared to those numbers, the poll placed Jesse Jackson's support at 16.75%. Use of the 16.75% figure would, however, only serve to further overemphasize the support received by Jesse Jackson.

[35] The court notes that the percentage of voter support is normally calculated with respect to other candidates within one's particular party. Here, in terms of actual voter returns, Jesse Jackson received 14.07% of Bleckley County votes cast on the Democratic party side. Dr. Willingham's poll would put 24.1% of the democratic vote behind Jesse Jackson.

[36] This point becomes clear when one compares the number of voters polled who expressed a preference favoring one of the top two candidates for either party to the actual votes cast in support of those top four candidates.

(Continued on following page)

Regardless of any possible assumptions which might be drawn from the actual 1988 presidential preference primary election returns,[37] this court is not satisfied that the results of Dr. Willingham's 1988 exit poll provide an accurate source from which the plaintiffs might buttress their position that elections in Bleckley County are characterized by white bloc voting. All the poll really *proves*, aside from the fact that it was conducted in a less than scientific manner, is that Jesse Jackson enjoyed strong support among black voters responding to the poll. Assumptions may be drawn in either direction from the flawed data in the poll. This court cannot premise its decisions upon unsupported assumptions but must demand credible evidence.[38]

(Continued from previous page)

CANDIDATE	POLL SUPPORT	ACTUAL SUPPORT	% OF SUPPORTERS ANSWERING POLL
Bush	119	345	(34.5%)
Dole	86	245	(35.0%)
Gore	319	933	(34.2%)
Jackson	161	250	(64.4%)

[37] Plaintiffs have misstated the evidence when they argue in reference to the 1988 poll, "[i]ts results were very close to the actual vote total received by candidate Jackson there [Bleckley County]." ("Plaintiffs' Post Trial Proposed Findings of Fact and Conclusions of Law," p. 14). Unless, of course, by this statement plaintiffs mean only that they were able to poll most every Jackson voter.

[38] This is especially so considering the less than scientific manner in which the poll was conducted. Plaintiffs' evidence, admittedly drawn from peripheral sources, would ideally have been gathered in a manner which truly presented a local appraisal of voting in the county.

Dr. Willingham stated that he was unable to engage in regression analysis with regard to the 1988 Jesse Jackson campaign. He attributed this inability to the fact that in the interim between the 1984 and 1988 elections, Bleckley County was consolidated into one precinct. This, according to Dr. Willingham, created an additional obstacle for the plaintiffs in their ability to obtain and analyze evidence. However, regardless of the obstacles encountered by plaintiffs in their analyses, the evidence presented by way of Dr. Willingham's exit poll is inconclusive and unconvincing as to whether voting in the 1988 primary was racially polarized.[39]

Other Elections

The court notes briefly the evidence presented with regard to other elections which plaintiffs identify as elections involving racial issues or themes. These are: the 1974 Lt. Gubernatorial candidacy of J.B. Stoner, an avowed white racist who mustered an unsettling amount of support from the white electorate statewide in that year; the 1974 Gubernatorial primary, in which former Governor Lester Maddox, who had built his political career on a platform of segregation, carried Bleckley County; in the 1968 election in which, then segregationist,

[39] There is no contention on the part of plaintiffs that the consolidation of the multi-precinct system into one precinct was itself a violation of the Voting Rights Act; nor, do plaintiffs contend that the consolidation results in a violation of the Act.

George Wallace received the most votes in Bleckley County.[40]

In 1974, J.B. Stoner received 426 votes or 20.4% of the total votes cast. (Plaintiffs' Exhibit 360). This placed him a strong second to candidate Mary Hitt. Correspondingly, Lester Maddox carried Bleckley County over eventual party nominee and Governor George Busbee; Maddox received 1007 votes or 44% of the vote. The evidence presented with regard to the 1968 presidential election amounts to one line in *The Cochran Journal. See* Plaintiffs' Exhibit 270 ("Bleckley County went almost solid for George Wallace as expected").[41]

[40] The court notes but does not make its ruling upon the evidence presented by defendants with regard to the local results in the 1984 re-election of Georgia Court of Appeals Justice Robert Benham, a black member of the Georgia Court of Appeals. However, while the court agrees that Judge Benham, as an incumbent in a race for re-election to judicial office, was in a unique situation, one that little indicates the leanings of the county electorate with regard to local elections, *see Stallings*, 829 F.2d at 1558-59 (*quoting Gingles*, 106 S.Ct. at 2770) ("special circumstances, such as the absence of an opponent, incumbency, . . . may explain minority success in a polarized race"), the same types of fact sensitive protestations might easily be lodged against the use of the Jesse Jackson campaigns as an indication of voter preference on the local level. The court's holding does not reflect the influence of such speculative extraneous information with regard to the Jackson campaign, but only an analysis of the evidence presented.

[41] The court notes, but sees no relevance to defendants' evidence with regard to elections for statewide office which involved minor black candidates who received little support from either black or white voters. This evidence is simply a nullity.

Despite this additional evidence, which the court notes involved elections for nonlocal offices – occurring over 15 years ago, this case and the evidence presented with regard to alleged racially polarized voting nonetheless do not fit neatly into this stage of the *Gingles* analysis. Terms such as "racially polarized voting" and "white bloc voting" suggest a pattern or situation involving sustained recurrent bloc voting based upon race: the very evil which the Act and its amendments seek to redress. To employ a term so rich in meaning and background in reference to the evidence before this court would not be consistent with the term's true significance. Plaintiffs would have the court ignore that indeed the burden of proof lies with them to prove as a precondition to recovery that "the white majority votes sufficiently as a bloc to enable it **usually** to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67 (emphasis added). Despite plaintiffs efforts to weave the available data into a pattern, this evidence simply falls short of proving polarized voting. The essence of the evidence presented is summed up in the testimony of Councilman Basby. He testified:

> " . . . you have to be known by blacks and whites to get elected for public office; therefore, you need a percentage of all black and white to get elected." (Transcript p. 312).

The Voting Rights Act does not require more than this. For this court to require more, based upon the paucity of evidence presented, would fly in the face of both the Congressional prohibition against requiring representation in proportion to the percentage of black people in the

community as well as the ruling of the Supreme Court that "commentators and courts agree that in the absence of significant white bloc voting it cannot be said that the ability of minority voters to elect their chosen representatives is inferior to that of white voters." *Gingles*, 478 U.S. at 48, n. 15, 106 S.Ct. at 2765, n. 15.[42]

Any additional evidence put forward by plaintiffs with regard to socio-economic barriers to voting and participation by blacks, while relevant to the court's analysis of the vote dilution claim under the totality of the circumstances, does not bear directly upon the courts [sic] analysis of whether election results evidence racial bloc voting.[43] As the *Collins* court stated, "[t]he legal standard for the existence of racially polarized voting looks only to the difference between how majority votes and minority votes were cast; it does not ask why those

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[42] While the *Gingles* Court was referring specifically to the necessary evidence "where the contested electoral structure is a multi-member district," *Id.*, the Eleventh Circuit has stated, "[w]e consider the single-member county commission to be in all essential respects comparable with the multi-member district discussed by the Court in *Gingles* . . . " *Stallings*, 829 F.2d at 1549.

[43] Such evidence falls under the Supreme Court's umbrella over evidence which is "supportive of, but *not essential* to a minority voter's claim." *Id.* (emphasis the Court's). The court must, before considering such supportive evidence, first analyze the essential evidence as to whether racial bloc voting is present. In the absence of proof of this essential element, a plaintiff's claim must fail. To find otherwise would be inconsistent with the Supreme Court's use of the term "precondition" to describe this stage of the analysis. *Id.* at 50, 106 S.Ct. at 2766.

votes were cast the way they were nor whether there were other factors present in contested elections . . . " *Collins*, 816 F.2d at 935. Just as defendants may not, at this stage of the analysis, object that a particular election was characterized by "white backlash," etc., plaintiffs may not rely upon socio-economic or other barriers as specific evidence that voting in the community is racially polarized. *Id.*

The court is left with very little from which to determine whether racially polarized voting is characteristic of elections in Bleckley County. Dr. Engstrom himself admitted that the results from the 1984 regression analysis and the 1988 exit poll standing alone provide little evidence from which a court could conclude that racially polarized voting exists in Bleckley County.[44] Dr. Engstrom sought to temper his admission by adding, "if that's all we had." Yet, under prevailing law with regard to this stage of the court's evaluation, the evidence to which Dr. Engstrom referred *is all* the court has or can have. *Id.*

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[44] Dr. Engstrom's testimony was as follows:

Q: Dr. Engstrom, from a statistical standpoint, we've looked at the '84 Jesse Jackson race and the results of the exit poll in '88 as they concern Jesse Jackson. Would you agree, based on your experience as a political scientist, that that is very little evidence in determining racial polarization in a community of a government of 77 years?

A: That by itself?

Q: Yes.

(Continued on following page)

To conclude anything other than that plaintiffs have failed to demonstrate that "the white majority votes sufficiently as a bloc to enable it *usually* to defeat the minority's preferred candidate" *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67 (emphasis added), would ignore a rare point of agreement between the opposing experts in the case *sub judice:* that the electoral evidence in this case constitutes no more than a paucity. *See Stallings*, 829 F.2d at 1557 (*citing Gingles*, 106 S.Ct. at 2770) ("[T]he [*Gingles*] Court noted that racial bloc voting is more probative of a claim that a district experiences legally significant polarized voting, if a pattern of bloc voting is shown over a period of time, rather than the results of a single election"); *See also Gingles*, 478 U.S. at 48, n. 15, 106 S.Ct. at 2765-66, n. 15 ("By recognizing the primacy of the history and extent of minority electoral success and of racial bloc voting, the court simply requires that § 2 plaintiffs prove their case"). Consistent with these views, the court finds that plaintiffs evidence fails to demonstrate a pattern of racial bloc voting.[45]

(Continued from previous page)

A: Would be little evidence, if that's all we had.

(Tr. 483).

[45] The court is mindful of the Supreme Court's directive that "Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process." *Gingles*, 478 U.S. at 57, n. 25, 106 S.Ct. at 2769 n. 25. These other factors will indeed be considered upon the court's analysis of the remaining Senate factors; the court, however, rejects plaintiffs' arguments that evidence other than that drawn from previous elections, i.e., Bleckley County's history of racial segregation, racial themes in public forums, etc., amounts to evidence of racial bloc voting.

2) Cohesiveness

Despite the language from case law suggesting that to prove racially polarized voting is to prove cohesiveness, the court does not conversely read its finding of a lack of evidence of racially polarized voting to be dispositive of the issue of cohesiveness. In other words, to fail to prove polarization does not mean that the minority community suffers a lack of cohesiveness. Of course, failure to prove that Bleckley County elections are characterized by racial bloc voting effectively ends the need for further analysis of the three-pronged *Gingles* test. In the interest of completeness, the court seeks to analyze the evidence with regard to the alleged cohesiveness of Bleckley County's black community. However, as with the analysis of whether or not voting in Bleckley County is demonstrably polarized, the court is shackled by the paucity of evidence presented.[46]

While Dr. Engstrom offered testimony as to his preconceived notion that, in general, where blacks clearly have an opportunity to elect a candidate of their choice, blacks offer and are elected for those seats, there is little evidence in the record to verify that Bleckley County

[46] The court does not rely upon evidence which defendants sought to introduce regarding minor black candidates for state-wide office; the weak performances of these candidates are less a demonstration of a lack of minority cohesiveness than they are a commentary upon the political vitality of those particular candidates.

specifically has a cohesive black electorate.[47] Specific evidence of cohesiveness must be presented.

To hold that the expert testimony of Dr. Engstrom alone meets the requirement that plaintiffs demonstrate that cohesiveness of Bleckley County's black community would amount to an abdication of the requirement set out by the *Gingles* Court altogether; cohesiveness would be presumed. Plaintiffs' less than convincing arguments suggests that all any plaintiff need prove to meet the cohesiveness precondition would be the very existence of a black community. While the evidence presented at trial exceeds that referenced in plaintiffs' proposed findings of fact, the record nonetheless fails to demonstrate that the black community in Bleckley County has "common interests evidenced by a *pattern* of bloc voting." *See Solomon*, 899 F.2d at 1019 (*citing Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67) (emphasis added).

Dr. Engstrom's regression analysis of the 1984 primary provides strong evidence that Bleckley County's black electorate supported Jesse Jackson; the same conclusion might have been drawn from a well implemented poll of the voters in 1988. But the results of two presidential preference primaries alone cannot be said to evidence

[47] Plaintiffs' proposed findings of fact overstate the specificity of the testimony of Dr. Engstrom in this regard. Plaintiffs' expert was speaking in general terms and referred to the cohesiveness of the black community in Bleckley County only insofar as a perception of cohesiveness which Dr. Engstrom, without the benefit of having ever been to Bleckley County, assigned to the local white electorate. ("Plaintiffs' Post-Trial Proposed Findings of Fact and Conclusions of Law," p. 24, ¶ 55; Transcript pp. 425, 435, 438).

a pattern. Plaintiffs also make reference to the electoral successes of black candidates in the majority black voting districts for the Bleckley County Board of Education as additional evidence of the cohesiveness of Bleckley County's black community. Specifically, plaintiffs point to the elections of plaintiff Reverend Hall to the school board in the 1986 election and the re-elections of Councilman Basby after the at-large electoral system was abandoned in favor of separate city council districts. Both of these men, black members of the community, represent majority black districts.

This court is not satisfied that plaintiffs have proven that the black community in Bleckley County is a politically cohesive one. This stage of the *Gingles* test is analogous to that in which the court analyzed the presence or absence of racial bloc voting evidence. Like that stage of the analysis of the present facts, the court is faced here with little credible evidence which would lend itself to a valid determination. Here, as there, counsel have presented conclusory materials without evidence sufficient to show the requisite pattern under *Gingles*.

The present case, so factually distinct from cases which have determined that a cohesive minority electorate merited remedy under the *Gingles* test, is void of credible evidence to demonstrate either a strong pattern of correlation between the number of registered black voters and the number of votes received by a candidate expected to receive black support or a pattern of unified support for particular candidates from the black community. This is what *Gingles* requires, and this court may require no less at this stage of its analysis. Plaintiff's

evidence simply fails to prove that Bleckley County's black community is politically cohesive.

3) Compactness

There can be but little dispute that the black community is sufficiently geographically compact to meet the *Gingles* standard. To their credit, counsel apparently refrained from their respective propensities and left this area unencumbered by surplusage. Defendants themselves relied in part upon evidence drawn from the majority black school board voting district to put forward evidence refuting plaintiffs' arguments with regard to cohesiveness. Although Bleckley County's entire black community is not concentrated in a single area, the evidence drawn from the 1988 voter registration data offered by defendants demonstrates that voting district #2 is approximately 55% black; blacks in the other four districts make up approximately 10% or less of the population in that district. Were the evidence to demonstrate that the commission should be enlarged, there is certainly a concentration of black voters in at least one demographic area. (Defendants' Exhibit 13).

4) Results of the *Gingles* Test

Despite a full presentation by the parties, an evaluation of all the available evidence can lead to only one conclusion. Plaintiffs' evidence fails to meet two requisite preconditions to relief as set out by *Gingles*. There is insufficient available evidence from which the court might determine that either racial bloc voting or a cohesive black electorate are proven characteristics of Bleckley

County.[48] Considering only those factors set out by the *Gingles* Court, plaintiffs have failed to prove that the current single commissioner form of government in Bleckley County results in less opportunity for members of the black community to participate in the political process or to elect representatives of their choice. *See Gingles*, 478 U.S. at 48, n. 15, 106 S.Ct. at 2765, n. 15 ("Consequently, if difficulty in electing and white bloc voting are not proved, minority voters have not established that the . . . [challenged] structure interferes with their ability to elect their preferred candidates").

B. Other Senate Factors

Once the *Gingles* test is satisfied, it is unclear whether a court is to analyze factors beyond those set out by the *Gingles* Court. This court, however, is not faced with such a situation. The significance of any additional evidence relevant to other Senate factors is limited by the court's determination that plaintiffs have failed to present evidence sufficient to satisfy the *Gingles* test. *See Gingles*, 478 U.S. at 49, 106 S.Ct. at 2766 ("These circumstances [the *Gingles* test] are *necessary preconditions* for multi-member districts to operate to impair minority voters ability to elect representatives of their choice . . . ") (emphasis

[48] The court does not suggest a failure to present otherwise available evidence leaves plaintiffs' case incomplete. As evidenced by the expansive, and no doubt expensive, efforts of the respective experts and attorneys, the evidence supporting the requisite *Gingles* preconditions is simply unavailable.

added). As stated above, the Eleventh Circuit has determined that the single member commission is in all relevant respects comparable with the multi-member districts. *Stallings*, 829 F.2d at 1549; n. 42, *supra*.

It would appear, then, that this court is not called upon to analyze the remaining Senate factors in order to render an opinion in the case *sub judice*. Were it not for a singular cryptic directive from the Supreme Court, this court's already exhaustive analysis would be at its end. However, in *Gingles*, the Court noted:

> Where a minority group has never been able to sponsor a candidate, courts must rely on other factors that tend to prove unequal access to the electoral process.

Gingles, 478 U.S. at 57, n. 25, 106 S.Ct. at 2769-70, n. 25. In *Gingles*, a case which like most cases addressing themselves to alleged violations of § 2 of the Act, involved evidence drawn from several elections, the Court appears to have attempted to anticipate a claim such as the unusual one before this court today. *See Westwego Citizens for Better Government v. Westwego*, 906 F.2d 1042, 1045 (5th Cir.1990) ("Gingles" teaches that where only a few (or no) indigenous elections include black sponsored candidates, a vote dilution claim is not foreclosed").

Sensitive to Supreme Court directives and consistent with cases addressing situations where local election returns suffer limited availability, this court has considered credible evidence put forward by plaintiffs with regard to allegations that racial bloc voting contaminates the challenged electoral structure in Bleckley County. It appears, according to the cases which have addressed the

footnote in *Gingles*, that the language used by the Supreme Court, while ambiguous, was intended to prevent trial courts from refusing to consider credible evidence drawn from any election with regard to racially polarized voting. However, read in another light, the footnote arguably directs a trial court to return to the Senate factors and the flexible test which have been otherwise abandoned. Even were this court to accept this reading of the Supreme Court directive, a reading which the court notes was not specifically proposed by plaintiffs, the evidence, nevertheless, fails to demonstrate that a change in the current structure of the county commission constitutes an available or proper remedy under the Act.

The facts in this case clearly indicate that Bleckley County's black community yet suffers the indignities associated with a proportionally poorer socio-economic status. Plaintiffs' expert, Dr. Willingham, provided extensive testimony that blacks in Bleckley County continue to suffer from a depressed socio-economic status, and that their socio-economic status hinders the possibility of blacks participating actively in the political process. He added that traditional barriers still work to make it unusually difficult for a candidate, black or white, who is depending upon black voters to sustain the interest of black community voters. There was testimony that unemployment and illiteracy are considerably higher within the black community than amongst whites. There appear also to have been problems in the past with regard to low black representation among workers at the election polling place.

Yet, with regard to the remaining Senate factors, it appears that little can be said to disparage Bleckley County. It is undisputed that there is no slating process to stand as a barrier to minority participation. Finally, as to whether the commission in Bleckley County fails to respond to the needs of the community or whether the county, as evidenced in the 1986 referendum, seeks to retain the single member commission to effectuate a tenuous policy, much has been said, but little has been proven. As stated above, there appears to be widespread local disagreement over the respective merits and shortcomings of the alternative systems given the size and revenue base of Bleckley County. After considering all the relevant evidence, it appears that what remains before the court is simply a whole community's disagreement over their preferred form of local government. This court does not have the authority to resolve such purely political disputes. The court's powers extend only to the resolution of disputes involving a violation of the Constitution, the Voting Rights Act or some other law.

The court's brief analysis of these additional factors provides some indication as to why the three principal factors covered by the *Gingles* test enjoy preferred evidentiary status in vote dilution claims. While plaintiffs' inability to present sufficient credible evidence drawn from local elections does not foreclose a vote dilution claim, the inability to present credible evidence supportive of the factors to be considered under the Act does foreclose a successful one in the case *sub judice*. Under any standard, under any reasonable test, considering every piece of credible relevant evidence and all factors,

plaintiffs' challenges to Bleckley County's single member commission must fail.

CONCLUSION

Plaintiffs have failed to meet either the minimum preconditions under the *Gingles* test or to present sufficient evidence in light of the other Senate factors under the totality of the circumstances. The evidence presented at trial with regard to these factors, while characteristically protracted, was neither compelling nor persuasive.

While a naked analysis of the Bleckley County voter registration rolls leaves exposed the possibility that a white candidate harnessing all of the white voter support in Bleckley County could conceivably use that unified support to trample the equally imaginary candidate (black or white) supported by the whole of the black electorate, the evidence presented at trial, by both defendants *and* plaintiffs, when interwoven with the relevant case law and considered under the totality of the circumstances, does not clothe this court with the power to strike down an electoral practice or procedure which *might* lead to such an abhorrent potential result. To require the change sought by plaintiffs, based upon the paucity of evidence before this court, would serve the purpose specifically proscribed by Congress of ensuring that members of the black community would be elected in numbers equal to their proportion in the population.

Plaintiffs cannot prevail on their claims that Bleckley County's sole commissioner form of government violates either the Constitution or Section 2 of the Voting Rights

Act. Accordingly, let judgment be entered for the defendants.

SO ORDERED.

Rev. E.K. HALL, Sr.; David Walker; U.S. Donalson; Richard Harris; Willie Ates; Rev. Wilson C. Roberson; and NAACP Chapter of Cochran, Bleckley County, Plaintiffs-Appellants,

v.

Jackie HOLDER, Individually and in his official capacity as County Commissioner for Bleckley County, Georgia; Robert Johnson, Individually and in his official capacity as Superintendent of Elections for Bleckley County; Charles Killebrew, Individually and in his official capacity as Mayor of the City of Cochran; Lonnie Barlow; Ben Jessup; C.C. Crooms; Willie Basby; Billy Ray Godfrey, and T.C. Greer, Individually and in their official capacities as Aldermen of the City of Cochran; William J. Lucas, Individually and in his official capacity as Superintendent of Elections for the City of Cochran; Freddie White; Wayne Rogers; Wayne Tripp; Sonja Curtis, and J. Larry Williams, Individually and in their official capacities as Members of the Bleckley County Board of Education, Defendants-Appellees.

No. 91-8306.

United States Court of appeals,
Eleventh Circuit.

March 25, 1992.

Black voters brought action complaining that single county commissioner form of government in Bleckley County, Georgia, violated Constitution and Voting Rights Act. The United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., Chief Judge, No. CIV85-242-2-MAC(WDO), 757 F.Supp. 1560, found no violation of Constitution or Voting Rights Act, and appeal

was taken. The Court of Appeals, Fay, Circuit Judge, held that: (1) determination of violation of § 2 of Voting Rights Act should be based on "totality of circumstances" test and is not limited to electoral evidence, and (2) voters showed that county's black electorate was sufficiently large and geographically compact and was a politically cohesive minority, and that white majority bloc voted so as to usually defeat black minority's preferred candidates, which established that sole commissioner system violated § 2.

Reversed and remanded.

Christopher Coates, Milledgeville, Ga., Laughlin McDonald, ACLU, Atlanta, Ga., for plaintiffs-appellants.

R. Napier Murphy, Martin Snow, Grant & Napier, John C. Daniel, Ill., Macon, Ga., William Lonnie Barlow, Arnold & Barlow, Cochran, Ga., for defendants-appellees.

Appeal from the United States District Court for the Middle District of Georgia.

Before FAY and HATCHETT, Circuit Judges, and GIBSON*, Senior Circuit Judge.

FAY, Circuit Judge:

This appeal involves a challenge to the sole commissioner form of county government utilized in Bleckley County, Georgia. Following a four day bench trial, the district court found that the plaintiffs had failed to meet

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

their burden of proof on both their statutory and constitutional claims. For the reasons that follow, we REVERSE the judgment of the district court.

I. BACKGROUND

A. *Bleckley County*

The history of Bleckley County began in 1912 when the Georgia legislature created Bleckley County from land located at the northeastern end of Pulaski County, Georgia. Encompassing about 219 square miles, Bleckley County is a rural county located in the central region of Georgia, approximately forty miles southeast of Macon.

Throughout its existence, Bleckley County has had a population that has ranged from about 9,000 residents to nearly 11,000 residents. According to census figures, the population of Bleckley County numbered 10,767 in 1980.[1] That population is approximately 22% black, 77% white, and 1% other.[2] The racial composition of Bleckley

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[1] The population figures used at trial come from the 1980 census. Since the trial, however, the data from the 1990 census has become available. The new census reveals that Bleckley County's population has decreased to 10,430. The population decrease of blacks has been proportionately smaller than the decrease of whites, thereby causing Bleckley County to have a slightly increased percentage of blacks.

[2] Nearly half of Bleckley County's population lives in the city of Cochran, the county seat. In Cochran, the percentage of black residents is considerably higher than in the county as a whole. There the racial composition of the population is approximately 33% black, 64% white, and 3% other.

County's voting age population is 19% black, 80% white, and 1% other. Voter registration levels in Bleckley County are roughly equivalent among blacks and whites, with black and white registration each at about 70% of each group's respective eligible population.

Since its creation, Bleckley County has operated with a sole commissioner form of county government. *See* 1912 Ga.Laws 38; 1913 Ga.Laws 345. This sole commissioner is the "county governing authority" under Georgia law, O.C.G.A. § 1-3-3(7), and he is vested with all the corresponding powers and duties, *see id.* § 36-5-22.1.

Bleckley County's sole commissioner is elected in an at-large county-wide election. Although the commissioner race has at times been subjected to a majority vote requirement, throughout most of its history, Bleckley County has elected its sole commissioner by a simple plurality vote. Since 1964, however, the county must elect its commissioner by a majority vote. *See* O.C.G.A. § 21-2-501.

Today, the election for county commissioner is held at the Jaycee Barn in Cochran. This facility, a building belonging to an all-white civic club, is the sole polling place for the entire 219 square mile area that makes up Bleckley County.[3] This sole precinct is also used for the

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[3] A number of polling places were previously available throughout Bleckley County, providing ready access to voters in the outlying areas of the county. These precincts were consolidated shortly after the 1984 presidential primaries.

elections of other county officials, including the members of the county's school board.[4]

B. *Procedural History*

On July 17, 1985, the plaintiffs-appellants in this case, black voters residing in Bleckley County, Georgia, together with the NAACP Chapter of Cochran/Bleckley County filed a complaint in the United States District Court for the Middle District of Georgia. Among the claims asserted, the plaintiffs presented a challenge to Bleckley County's form of county government under § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and under the Fourteenth and Fifteenth Amendments.[5] The defendants named in this challenge, the appellees herein, are Bleckley County's sole county commissioner and the county's superintendent of elections.

In December of 1989, over four years after this action was commenced, the district court tried this case without a jury. On March 7, 1991, more than a year after that trial, the district court entered an extensive order finding that

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[4] Despite the existence of only one precinct, school board members are not elected in an at-large election. Instead, the multi-member board is elected from five single-member districts. This is accomplished in the sole precinct setting by assigning the voters from each district to specified voting machines that correspond to their districts.

[5] In their complaint, the plaintiffs also challenged the manner of electing the Bleckley County Board of Education and the Cochran City Council. Those claims were settled prior to the trial of this case, however, and the challenge to Bleckley County's form of government was the sole claim tried in the district court.

the plaintiffs had failed to establish either a racially discriminatory intent in the creation or maintenance of Bleckley County's form of government or an impermissible dilution of the electoral power of Bleckley County's black minority. The district court entered a final judgment for the defendants, and the plaintiffs filed a timely appeal.

II. DISCUSSION

In reviewing the judgment of the district court, we are bound by the clearly erroneous test set forth in Rule 52(a) of the Federal Rules of Civil Procedure, the standard upon which an appellate court is to review ultimate factual findings of vote dilution. *Thornburg v. Gingles*, 478 U.S. 30, 78-79, 106 S.Ct. 2752, 2781, 92 L.Ed.2d 25 (1986); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1554 (11th Cir.1987,) *cert. denied*, 485 U.S. 936, 108 S.Ct. 1111, 99 L.Ed.2d 272 (1988). Nonetheless, this standard does not bar a court from correcting errors of law or findings of fact based on misconception of the law. *Gingles*, 478 U.S. at 79, 106 S.Ct. at 2781; *Concerned Citizens v. Hardee County Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990); *Stallings*, 829 F.2d at 1554.

A. *The Voting Rights Act*

The statutory claim we address on appeal is unusual in that it challenges a local form of government

composed solely of one commissioner.[6] It is not a unique challenge, however, and we have already held that § 2 challenges to sole commissioner forms of government are subject to the same analysis employed by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). *Stallings*, 829 F.2d at 1549

The essential dictate of § 2 of the Voting Rights Act, as amended, is:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .

42 U.S.C. § 1973(a). At one time, § 2 was interpreted to require proof of discriminatory intent in the design or maintenance of a challenged scheme before plaintiffs could prevail on their statutory claims. *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality opinion). In 1982, however, Congress amended § 2 so as to make clear that the "results test" utilized by pre-*Bolden* courts is the proper standard by which § 2 claims are to be measured. *See Chisom v. Roemer*, ___ U.S. ___,

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[6] Although the plaintiffs asserted both statutory and constitutional vote dilution claims, because we hold that this case establishes a violation of § 2 of the Voting Rights Act, we do not reach the plaintiffs' claim of a constitutional violation. *See Escambia County v. McMillan*, 466 U.S. 48, 51, 104 S.Ct. 1577, 1578, 80 L.Ed.2d 36 (1984) (a violation of § 2 moots a constitutional claim of vote dilution).

111 S.Ct. 2354, 2363 & n. 21, 115 L.Ed.2d 348 (1991); *Gingles*, 478 U.S. at 43-44 & n. 8, 106 S.Ct. at 2762 & n. 8; *Solomon v. Liberty County*, 899 F.2d 1012, 1015 (11th Cir.1990) (en banc) (Kravitch, J., specially concurring), *cert. denied*, ___ U.S. ___, 111 S.Ct. 670, 112 L.Ed.2d 663 (1991); *id.* at 1027-32 (Tjoflat, C.J., specially concurring). In amending § 2, Congress also made clear that courts are to evaluate § 2 claims in light of "the totality of circumstances" upon which such claims are premised. 42 U.S.C. § 1973(b). Accordingly, courts are to consider a wide variety of factors when confronted with § 2 challenges.[7]

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[7] The factors most frequently set forth for consideration are the "typical factors" listed in the Senate Report accompanying the 1982 amendments to § 2. These factors, now known as "the Senate Report factors," are listed below:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the

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Although various factors may be relevant to a § 2 claim, before a challenged procedure will violate § 2, "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 49, 106 S.Ct.

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effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether the political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S.Rep. No. 97-417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07 (footnotes omitted). The Senate Report also noted that additional factors had been shown to have probative value in establishing a violation:

> whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207 (footnotes omitted). Despite the Senate's express enumeration of these typical factors, "this list of factors is neither comprehensiye nor exclusive." *Thornburg v. Gingles*, 478 U.S. 30, 45, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1980). Other factors may be considered, and a "functional" view of the political process will determine the interplay and weight of the various relevant factors. *See id.*

at 2766. Accordingly, there are three "necessary preconditions" to the establishment of a § 2 violation: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Id.* at 50-51, 106 S.Ct. at 2766 (citations omitted).

Although the *Gingles* Court set forth these three factors as preconditions to a § 2 claim, we are mindful that "[t]he essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47, 106 S.Ct. at 2764. A limitation on the evidence to be considered in evaluating the *Gingles* factors is neither what Congress intended in § 2 nor what the Supreme Court directed in *Gingles*. Rather, the *Gingles* decision places a "gloss" on the Senate Report factors, limiting the use of the factors by requiring that the three *Gingles* factors be established to prove a vote dilution claim. *Stallings*, 829 F.2d at 1555 (citing *Collins v. City of Norfolk*, 816 F.2d 932 (4th Cir.1987)). The *Gingles* majority did not, however, limit the manner in which the threshold factors may be proven. In fact, the legislative history of § 2 reveals that Congress espoused a "flexible, fact-intensive test for § 2 violations." *Gingles*, 478 U.S. at 46, 106

S.Ct. at 2764. Thus, the totality of the circumstances surrounding a § 2 claim may properly be considered when determining whether plaintiffs have established the three *Gingles* preconditions.[8] *See Solomon*, 899 F.2d at 1017 (Kravitch, J., specially concurring). Although § 2's functional view of the political process elevates certain Senate Report factors because of their direct bearing on the § 2 threshold inquiry, other relevant factors remain "supportive of, but *not essential to*, a minority voter's claim." *Gingles*, 478 U.S. at 48-49 & n. 15, 106 S.Ct. at 2765 & n. 15. These factors become relevant at the *Gingles* threshold stage insofar as they are supportive of the three *Gingles*

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[8] If the totality of the circumstances could not be considered in reviewing the *Gingles* factors, then courts would often be left to consider statistical and census data in an inappropriate contextual vacuum. The interaction of social and historical conditions with the challenged system would not be considered despite the fact that such interactions are central to § 2 claims. Moreover, plaintiffs would always be forced to present mathematically "certain" statistical data in order to sustain their evidentiary burdens under the preponderance of the evidence standard. Even where the totality of the circumstances established that a challenged system violated § 2, plaintiffs would be unable to prevail if the method of polling or the electorate's size and composition were such that the gathering of mathematically "certain" statistical data would be impossible. *Gingles* does not require such a result. *Cf.* 478 U.S. at 57 n. 25, 106 S.Ct. at 2769-70 n. 25.

factors. The additional factors, however, need not be present to satisfy the *Gingles* test.[9]

B. *Gingles Analysis*

On appeal, the plaintiffs-appellants argue that: (1) the district court erred as a matter of law by limiting its consideration to only certain types of evidence of a § 2 violation; and (2) the district court erred in finding that the plaintiffs had failed to meet their burden of proof. In reviewing the district court's determinations on the threshold *Gingles* factors, we agree with the district court that Bleckley County's black electorate is sufficiently large and geographically compact to meet the first prong of the *Gingles* test. However, we disagree that the evidence failed to establish the other two *Gingles* factors, a politically cohesive minority and a white majority bloc that votes so as to usually defeat the black minority's preferred candidates. Additionally, we hold that Bleckley County's sole commissioner system violates § 2.

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[9] Although the *Gingles* factors may have been established in a particular case, the continuing role of the parties and of the court is unclear: This circuit remains divided on the issues of whether plaintiffs can make out a § 2 violation simply by establishing the *Gingles* factors and whether defendants can raise a defense under the totality of the circumstances after the plaintiffs have satisfied the *Gingles* preconditions. *Solomon v. Liberty County*, 899 F.2d 1012, 1013 (11th Cir.1990) (en banc) (per curiam); *id.* at 1017, 1021 (Kravitch, J., specially concurring); *id.* at 1033 (Tjoflat, C.J., specially concurring).

(1) Size and Geographic Compactness of Minority Group

The evidence presented at trial reveals that black voters comprise a majority of the electorate in one of the five districts currently found in Bleckley County.[10] The defendants argue, however, that using these districts as a measure of the size and geographic compactness of Bleckley County's electorate is inappropriate. Instead, the defendants contend that the proper measure of size and geographic compactness should be the entire county. Because the county currently elects only one commissioner, the defendants argue that a black electorate constituting only 22% of the county's population can never form a majority with the potential to elect Bleckley County's sole commissioner. They argue that it is improper to subdivide this "commissioner district" when performing a § 2 analysis.

Although § 2 clearly states that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population," 42 U.S.C. § 1973(b), it is appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive. In *Gingles*, the Supreme Court recognized that threshold significance is given to this first

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[10] The five currently existing districts were formed for purposes of electing the county's multi-member school board. Within one of these districts (District 2), black voters constitute approximately 65% of the electorate; within the other districts, they constitute no more than 12% of the electorate. (Defs. Ex. 13).

Gingles factor because: "Unless minority voters possess the *potential* to elect representatives *in the absence of the challenged structure or practice*, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n. 17, 106 S.Ct. at 2766 n. 17 (second emphasis added). Thus, before a voting rights injury can be established, the minority group must demonstrate its potential electoral power in the absence of the challenged structure. It is therefore highly relevant to the *Gingles* inquiry "whether black voters . . . are sufficiently numerous and compact to constitute a majority in a single member district, *if single member districts were created out of the one county district.*" *Stallings*, 829 F.2d at 1563 (emphasis added). For that reason, this court remanded a challenge to the sole commissioner structure in Carroll County, Georgia to the district court with instructions to consider size and geographic compactness within proposed three member and five member forms of commission government. *Id.*

Because the evidence in this case reveals that Bleckley County's black voters are sufficiently numerous and geographically compact to constitute a majority in a single-member district (*e.g.*, District 2), we agree with the district court that the first *Gingles* factor has been satisfied.

(2) Existence of Racial Bloc Voting

In analyzing the issue of racial bloc voting, the district court focussed on raw election figures and statistical calculations. In particular, the district court concentrated

on regression analysis statistics from the 1984 presidential primary and on exit poll data from the 1988 presidential primary, evidence taken from presidential primaries involving the Reverend Jesse Jackson. The court also looked to the successes of local black politician Willie Basby in Cochran City Council elections and discussed the support garnered by black candidates in a number of races. The district court then limited its consideration to only that evidence which it believed § 2 jurisprudence would allow it to consider. It concluded from that evidence that there was a paucity of electoral evidence showing racially polarized voting, *Hall v. Holder*, 757 F.Supp. 1560, 1580 (M.D.Ga.1991), and that the plaintiffs had failed to carry their burden of proof on the racial bloc voting *Gingles* factor.

However, the district court reached this conclusion while operating under a misconception of the law. The district court stated that "under prevailing law with regard to this stage of the court's evaluation, the evidence [from the 1984 and 1988 presidential primaries] *is all* the court has or can have." *Hall*, 757 F.Supp. at 1580 (citing *Collins*, 816 F.2d at 935). The court reasoned that non-electoral evidence "does not bear directly upon the courts [sic] analysis of whether election results evidence racial bloc voting." *Id.* at 1579 (footnote omitted). Although the district court's legal interpretation of the evidence would support the district court's ultimate conclusion, such restricted, piecemeal consideration of the evidence failed to take into account the synergistic effects of evidence in establishing racially polarized voting.

Here, non-electoral evidence was not being offered to rebut electoral evidence showing the existence of racially

polarized voting; instead, it was offered to buttress such evidence. Moreover, the use of non-expert testimony and non-statistical evidence has been approved by this court as a means of proving racially polarized voting. *See, e.g., Stallings*, 829 F.2d at 1558 (noting that it is "clearly acceptable" to use non-expert testimony in establishing racially polarized voting); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1567 n. 34 (11th Cir.) (quoting *Nevett v. Sides*, 571 F.2d 209, 223 n. 18 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980)), *cert. denied and appeal dismissed*, 469 U.S. 976, 105 S.Ct. 375, 83 L.Ed.2d 331 (1984); *see also Westwego Citizens for Better Gov't v. City of Westwego*, 946 F.2d 1109, 1118 (5th Cir. 1991). *But see Collins*, 816 F.2d at 935-36 (rejecting the use of causation evidence concerning voting patterns). In situations where election data and derivative statistical information are systemically unavailable, such as when plaintiff minority groups are unable to sponsor candidates, the Supreme Court has further directed courts to rely on factors beyond election data that tend to prove unequal access to the electoral process. *See Gingles*, 478 U.S. at 57 n. 25, 106 S.Ct. at 2770.[11] Examining the issue of racial bloc voting under the totality of the circumstances existing in Bleckley County, we are forced to conclude that the district court reached a clearly erroneous conclusion based on its misconception of the law.

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[11] Although the district court correctly interpreted this language in *Gingles* as expanding the scope of permissible evidence of racial bloc voting, it construed the expansion to include nothing but data from exogenous elections, *i.e.*, elections for offices existing apart from the challenged local structure. We find that construction of *Gingles* to be too narrow.

In this case, the district court was not confronted with a complete lack of relevant election and statistical information. Indeed, Bleckley County election results for races in which blacks ran for state and national offices were submitted into evidence. Similarly, election results were submitted for races in which blacks ran for office in the city of Cochran.[12] Yet, blacks have neither sponsored candidates nor run for county-wide positions in Bleckley County's government. Specifically, Bleckley County's blacks have not sponsored a candidate for the sole commissioner seat, and no black has ever run for the office of commissioner.[13] Lay testimony by Bleckley County's black community leaders, many of whom are seasoned local politicians, revealed a belief that it is next to impossible for a black candidate to win an at-large county-wide election in Bleckley County, primarily because of the

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[12] Despite the submission of these election results, statistical correlations between the race of voters and the way in which ballots were cast could not generally be calculated in Bleckley County. This absence of statistical data resulted directly from the manner in which Bleckley County runs its elections and the manner in which Bleckley County records the results of those elections. The district court specifically stated that it was not suggesting that the plaintiffs had failed to present all available statistical evidence; the court simply believed that the instant case involved a paucity of *statistical* evidence. *Hall v. Holder*, 757 F.Supp. 1560, 1573 n. 22 (M.D.Ga.1991).

[13] Only one black candidate, the Reverend E.K. Hall, has run for a county-wide position in Bleckley County. He lost a race against a white candidate in 1984, only to be elected in 1986 as the county school board representative of District 2, Bleckley County's majority black district.

impact of the non-Cochran vote, a vote having a substantially lower percentage of blacks. The individual and collective experiences of these black leaders reveal that, as a practical political matter, blacks are unable to sponsor candidates for Bleckley County's sole commissioner office because such candidacies are futile. The district court itself recognized this futility at trial, commenting as follows: "Having run for public office myself, I'll guarantee you, under the circumstances, I wouldn't run if I were black in [Bleckley] county. You're going to put your hard-earned time and shoe leather campaigning throughout this county . . . under these circumstances?" (R6:808). Notwithstanding this assertion, the district court relied only on electoral evidence and chose not to consider the impact of the totality of the circumstances on the issue of racial bloc voting.

The district court did, however, recognize the following: "The regression analysis [of the 1984 presidential primary] demonstrates that white and black voters did not agree upon whom the democratic [sic] party should nominate. Jesse Jackson enjoyed the electoral support of a majority of black voters; very few white voters supported Jesse Jackson." *Hall*, 757 F.Supp. at 1576. That conclusion resulted from regression analysis data revealing that 60.8% of black voters supported Jackson while only 0.9% of white voters supported Jackson.[14] Exist poll data also

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[14] The district court pointed out that the plaintiffs' regression analysis did not include an indication of a "margin of error." Yet, the regression figures were nearly identical to figures compiled in a *CBS News/New York Times* exit poll for the state of Georgia. Moreover, the record reveals that correlation

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indicated that black support for Jackson increased to over 90% of the black electorate in the 1988 presidential primary while white support was at a level of less than 2% of the white electorate.[15] Yet, the district court concluded that this evidence failed to establish a pattern of racially polarized voting or racial bloc voting. The district court reasoned that there was no specific, direct evidence of racial polarization or racial bloc voting *in local county elections*. The record and the district court's factual findings nonetheless reveal that there was racially polarized voting in Bleckley County.

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coefficients for the regression analysis were over 0.9 for the "r" values and over 0.8 for the "r^2" values, both in the weighted and in the unweighted regression analyses. The range for such coefficients ranges from 0 to 1, with 0 indicating no relationship and 1 indicating a perfectly consistent relationship. *See Solomon*, 899 F.2d at 1020 n. 9 (Kravitch, J., specially concurring).

[15] The district court erred in concluding that the exit poll data had no evidentiary value whatsoever simply because the court concluded that the poll required the drawing of "assumptions" from the actual election returns. The court's error was the result of its erroneous legal conclusion that the poll results must themselves *prove* racially polarized voting in the analyzed election. *See Hall*, 757 F.Supp. at 1578 ("All the poll really *proves*, aside form the fact that it was conducted in a less than scientific manner, is that Jesse Jackson enjoyed strong support among black voters responding to the poll."). Although the court found that assumptions could be drawn in "either direction from the flawed data in the poll," *id.*, the court did not consider the light that the totality of the circumstances surrounding that election would have shed on the poll

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Election results in the city of Cochran reveal that black candidates were regularly defeated by white candidates in at-large elections conducted in the city.[16] However, after city elections were restructured so that the city of Cochran had a majority black district, black candidates were elected as the representatives of the majority black district. Similarly, although the only black candidate who had run in an at-large county-wide election had been soundly defeated, that same candidate was elected by the newly created majority black school board district in the first election where the majority black district was permitted to elect a county official.

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results. Such evidence would have strengthened the credibility and reliability of the poll as an indicator of racial bloc voting. At the same time, the increased evidentiary value of the poll results would have served to increase the evidentiary value of the other evidence in establishing a pattern of racial bloc voting. In the context of establishing a pattern of racially polarized voting, the interplay of evidence with its synergistic effects should not be ignored.

[16] The only local black politician who has enjoyed any appreciable success in at-large elections in Cochran is Willie Basby. *See Hall*, 757 F.Supp. at 1568 (setting forth the election results in Basby's races for the Cochran City Council). Although the district court generally excluded Cochran election results from its consideration because they did not involve the full Bleckley County electorate, *id.* at 1574 n. 24, the court stressed the "electoral anthology of the triumphs" of Councilman Basby as the most pronounced evidence offered by the plaintiffs. *Id.* at 1573. Yet, the district court recognized at trial that Basby's successes were an aberration, due largely to circumstances that were particular to Basby and which had allowed Basby to garner unusually high cross-over support from Cochran's white voters. (R6:808, 811). Moreover, Basby's

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Evidence was also presented of elections involving racial themes: the 1974 Lt. Gubernatorial race involving J.B. Stoner, an avowed white racist; the 1966 and 1974 Gubernatorial races involving Lester Maddox, a former governor who had built his political career on segregation; and the 1968 presidential race involving then-segregationist George Wallace. Although these elections occurred over fifteen years prior to the trial of this case, the significant support garnered by these candidates indicates that a substantial number of Bleckley County's voters were highly susceptible to racist, segregationist appeals as late as the mid 1970's, and that they voted accordingly.

A number of the district court's other specific factual findings, coupled with election evidence, reveal that

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initial success occurred only during an election requiring a simple plurality, his first two victories were attained by narrow margins, and he has been running unopposed since his third victory (attained in his fifth campaign).

Still, the district court did not properly discount Basby's successes despite Basby's aberrational status and despite Basby's own assertions that he could not achieve the same success on a county-wide basis. Instead, the court considered his campaigns, although not "as rebuttal evidence against a showing that blacks have not fared well in elections in Bleckley County." *Id.* at 1574 n. 24. The many and much more common defeats of other black candidates were relegated to the following level of consideration: "the court also takes note of the city council elections in which other black candidates did not fare so well, i.e., plaintiff Harris (1977), plaintiff Hall (1978), etc." *Id.* Notably, there were 12 at-large elections in which blacks ran losing campaigns in Cochran against white candidates. Basby, on the other hand, was elected over white candidates on 3 occasions: once with 39% of the vote, once with 50.5% of the vote, and once with 70% of the vote.

Bleckley County indeed suffers from racially polarized voting. For instance, Bleckley County had enforced racial segregation in all aspects of local government and local government services until forced to change by federal legislation in the 1960's. *Id.* at 1562. Bleckley County had debated and fought desegregation in all aspects of public life, continuing its resistance until as late as the early 1970's. *See id.* Local government had deprived blacks of the opportunity to participate in public life and government, even prohibiting blacks from registering to vote and from voting until well into the 1960's. Although Bleckley County's government discontinued these overt racial practices, largely due to federal intervention, the black citizens of Bleckley County continue to suffer from the effects of discrimination – socio-economic conditions that are far more depressed than those of their white counterparts.[17] *Id.* at 1562-63. This depressed socio-economic situation "hinders the ability of and deters black residents of Bleckley County from running for public office, voting and otherwise participating in the political process," *id.* at 1563, with the sole precinct system in Bleckley County serving as a further barrier to active political participation by blacks, *id.* at 1563 n. 3. Moreover, the "personal preferences" of Bleckley County's

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[17] The depressed socio-economic condition of Bleckley County blacks is reflected in circumstances such as the low level of blacks with high school educations, the lack of telephones and automobiles in black homes, the low per capita and family incomes of blacks, and the relatively large percentage of blacks living below the federally recognized poverty line.

citizens has resulted in racially exclusive organizations[18] in Bleckley County. These organizations, in turn, give blacks and whites in Bleckley County a different exposure to the candidates running for local, state, and national offices.

In its *Gingles* threshold analysis, the district court decided not to consider any of the evidence presented by the plaintiffs other than the presidential primary election data for 1984 and 1988. It discounted the value of that data and found it insufficient to establish racial bloc voting. The court also chose to discount the value of elections in the city of Cochran, with the possible exception of the successes of Willie Basby. Other evidence was neither considered nor discussed within the scope of the *Gingles* analysis because the court believed that it was prohibited from considering the evidence in evaluating the plaintiffs' compliance with the *Gingles* factors. These decisions were the crucial errors committed by the district court as a result of its misconception of the law.

When the evidence found in the record is analyzed within the proper legal framework, *i.e.*, the totality of the circumstances is reviewed for its impact upon the issue of racially polarized voting,[19] the evidence conclusively

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[18] These organizations are mostly churches, civic clubs, and social clubs. The record reveals that these generally segregated organizations frequently serve as forums for political candidates and political discourse.

[19] We stress that evidence of the totality of the circumstances is normally relevant at this threshold stage of the proceedings only insofar as it presents evidence bearing on the *Gingles* factors. The other Senate Report factors will not assist

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establishes a pattern of racially polarized voting in Bleckley County. Accordingly, the district court's conclusion that the *Gingles* factor requiring racial bloc voting was not satisfied in this case is clearly erroneous.

(3) Existence of Political Cohesiveness

Upon reviewing the record in this case, we also hold that the district court erred in concluding that Bleckley County lacks a politically cohesive black electorate. In reviewing this *Gingles* factor, the district court essentially committed the same error that it committed in analyzing the issue of racial bloc voting. That error was further compounded because the district court evaluated the existence of political cohesiveness after concluding that there was no racially polarized voting in Bleckley County. We have previously noted that "proof of racial polarization may . . . be found sufficient by this court to make the necessary finding of cohesiveness." *Stallings*, 829 F.2d at 1563 n. 15. Nonetheless, the record evidence and the specific factual findings of the district court, coupled with the existence of racially polarized voting, conclusively reveal that the *Gingles* requirement of political cohesiveness has been satisfied.

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plaintiffs in meeting the necessary preconditions simply because they are found to exist in a particular case. *Gingles*, 478 U.S. at 49 n. 15, 106 S.Ct. at 2765 n. 15. At this threshold stage, their importance is derived solely from the supportive, synergistic effect that they lend to the determination of the *Gingles* factors. However, where the challenged electoral system entirely forecloses the gathering of evidence bearing directly on the *Gingles* factors, courts must rely on other factors establishing unequal access to the political process, even though the *Gingles* factors cannot be proven. *Id.* at 57 n. 25, 106 S.Ct. at 2769-70 n. 25.

C. *Violation of § 2 in Bleckley County*

The district court not only erred in its legal analysis of the *Gingles* threshold factors, but it also erred in its "brief" final analysis of the plaintiffs' § 2 claim. That final analysis of the plaintiffs' claim under the totality of the circumstances, undertaken despite the court's conclusion that the *Gingles* factors had not been met, was seriously flawed. The flaw resulted from the premise upon which the district court operated: that the three *Gingles* factors had not been satisfied and were, in fact, unsupportive of the plaintiffs' case.

However, we find that the plaintiffs satisfied the *Gingles* test. At a minimum, satisfaction of the three *Gingles* factors shifts the burden to defendants to offer rebuttal evidence. *See Solomon*, 899 F.2d at 1035 (Tjoflat, C.J., specially concurring). No meaningful rebuttal evidence was offered, and the totality of the circumstances found in Bleckley County clearly reveal a situation where the electoral power of Bleckley County blacks has been abridged "on account of race or color." Accordingly, the district court erred in its ultimate conclusion that the plaintiffs had not proven their § 2 claim.

Having concluded that the district court erred in failing to enter judgment for the plaintiffs, we REVERSE the district court and REMAND for the imposition of a remedy.[20]

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[20] To facilitate the devising of such a remedy in the district court, we would point out the apparent success of the Bleckley County school board districts as implemented by Georgia law and the consent decree entered earlier in this case. The remedy for the system challenged in this case could well be modeled after that plan, taking into account the particular problems and concerns of Bleckley County, as well as the requirements of the Voting Rights Act.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-8306

REV. E.K. HALL, SR.; DAVID WALKER, U.S. DONALSON; RICHARD HARRIS; WILLIE ATES; REV. WILSON C. ROBERSON; NAACP CHAPTER OF COCHRAN, BLECKLEY COUNTY,

Plaintiffs-Appellants,

versus

JACKIE HOLDER, Individually and in his official capacity as County Commissioner for Bleckley County, Georgia; ROBERT JOHNSON, Individually and in his official capacity as Superintendent of Elections for Bleckley County; CHARLES KILLEBREW, Individually and in his official capacity as Mayor of the City of Cochran; LONNIE BARLOW; BEN JESSUP; C.C. GROOMS; WILLIE BASBY; BILLY RAY GODFREY, and T.C. GREER, Individually and in their official capacities as Aldermen of the City of Cochran; WILLIAM J. LUCAS, Individually and in his official capacity as Superintendent of Elections for the City of Cochran; FREDDIE WHITE; WAYNE ROGERS; WAYNE TRIPP; SONJA CURTIS, and J. LARRY WILLIAMS, Individually as in their official capacities as Members of the Bleckley County Board of Education,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Filed May 27, 1992)

(Opinion March 25, 1992 , 11th Cir., 19___, ___ F.2d ___).

Before: FAY and HATCHETT, Circuit Judges, and GIBSON*, Senior Circuit Judge.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

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* Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.